CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 53

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
PETITIONERS.

vs.

AVERY BRUNDAGE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1938.

CERTIORARI GRANTED MAY 31, 1938.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. .....

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHL-STEDMAN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6355

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHL-STEDMAN, ET AL.,
Appellees.

Counsel for Appellants:
MR. KENART M. RAEN,

Counsel for Appellees:
MR. SIGMUND W. DAVID,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

U. S. C. C. A.
FILED
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DOCKETED AUG. 11, 1937.
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PRINTED RECORD.

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6355

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHLSTEDMAN, ET AL.,
Appellees.

Counsel for Appellants:
MR. KENART M. RAHN,

Counsel for Appellees:
MR. SIGMUND W. DAVID,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Philip L. Sullivan, District Judge of the United States for the Northern District of Illinois, on Twelfth and Thirteenth days of July, in the year of our Lord one thousand nine hundred and Thirty-Seven, being one of the days of the regular July Term of said Court, begun Monday, the Fifth day of July, and of our Independence the 162nd year. Placita.

Present:

Honorable Philip L. Sullivan, District Judge.
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division.

In the Matter of
Tax Service Association of Illinois,
a corporation,
Alleged Bankrupt. } No. 65890.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Third day of May, A. D. 1937.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—65890) • •

To the Honorable Judges of Said Court:

The petition of Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, respectfully represents that the said Tax Service Association of Illinois has for the greater portion of six (6) months next preceding the date of the filing of this petition had its principal place of business and residence in the City of Chicago, County of Cook and State of Illinois, at 228 N. LaSalle St. and owes debts in the amount of One Thousand ($1000.00) Dollars and in excess thereof; that the said alleged bankrupt is engaged in the business of rendering services in connection with the levy and collection of taxes both real and personal, and is not a railroad, municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act, and that it is now insolvent.

That your petitioner, Commerce Clearing House, Inc., has

a provable claim against the alleged Bankrupt for the sum of Thirty-four ($34.00) Dollars for books and reports sold and delivered and services rendered to the alleged Bankrupt at its special instance and request.

4 That your petitioner, Andersen, Witte Engraving Co., a corporation, has a provable claim against the said alleged Bankrupt, for the sum of One Hundred Twenty-six and 95/100 ($126.95) Dollars, for printed materials and supplies sold and delivered to the said alleged Bankrupt at its special instance and request.

That your petitioner, W. L. Eckley, has a provable claim against the said alleged Bankrupt, for the sum of Three Hundred ($300.00) Dollars, representing commissions due and owing him from the said alleged Bankrupt for sales consummated and services rendered to the said alleged Bankrupt at its special instance and request; and your petitioner, W. L. Eckley, hereby waives any claim for priority which he may or might have by virtue of the said claim as a wage claim or otherwise.

That your petitioner, National Bureau of Property Administration, Inc., a corporation, has a provable claim against the said alleged Bankrupt, for the sum of One Thousand Twenty-nine and 25/100 ($1029.25) Dollars, represented by a judgment rendered in favor of your petitioner, National Bureau of Property Administration, Inc., a corporation, against the said alleged Bankrupt on the 19th day of March, A. D. 1937, in the Circuit Court of Cook County, Illinois, Case No. 37C 1331, and which judgment remains unpaid and unsatisfied, and that your petitioner has a further provable claim against the alleged Bankrupt in the sum of Five Thousand ($5000.00) Dollars representing moneys of your petitioner which the alleged Bankrupt fails and refuses to surrender and deliver to your petitioner.

Your petitioners further represent that they have not received any preference, and that their claims, with the exception of W. L. Eckley, are not wage claims nor entitled by law to priority of payment, and as to the claim of the said W. L. Eckley, any and all priority by virtue of the said claim being a wage claim is hereby expressly waived.

5 Your petitioners further represent that the alleged Bankrupt, while insolvent and with intent to commit a

preference over its general creditors, committed an act of bankruptcy within four (4) months last past preceding the filing of this petition in that it did heretofore transfer while insolvent, a portion of its property to one or more of its creditors, with intent to prefer such creditors over its other creditors by paying out certain sums of its money to creditors, the amounts, dates and names of the creditors to whom such preferential payments were made being as follows:

$38.62 February 13, 1937 M. R. Lome & Co.
$50.00 January 4, 1937 Twentieth Century Press

said sums of money being in payment of pre-existing indebtedness.

Your petitioners further represent that within four (4) months last past prior to the filing of this petition, the said alleged Bankrupt committed a further act of bankruptcy in that it suffered or permitted, while insolvent, a creditor, to obtain through legal proceedings a judgment, and did not vacate or discharge the same within thirty (30) days from the date such judgment was obtained, that is to say on March 19th, 1937, the said alleged Bankrupt suffered a judgment to be obtained against it through legal proceedings in the Circuit Court of Cook County, Illinois, Case No. 37C 1331, in favor of National Bureau of Property Administration, Inc., a corporation, for the sum of One Thousand Twenty-nine and 25/100 ($1029.25) Dollars, upon which execution No. 157073 was issued by the Clerk of said Court on March 30, 1937, and which said judgment was and is a lien upon the personal property of the alleged Bankrupt, and which judgment is still in full force and effect unpaid and unsatisfied, and the said alleged Bankrupt has not within thirty (30) days from the date such judgment was obtained had the said judgment vacated or discharged.

6 Your petitioners further represent that the alleged Bankrupt has within four (4) months last past immediately preceding the filing of this petition conveyed, transferred, concealed or removed, or permitted to be concealed or removed, parts and portions of its property with intent to hinder, delay or defraud its creditors or any of them.

Wherefore, your petitioners pray that the services of this petition with a subpoena may be made upon the Tax Service Association of Illinois, an Illinois corporation, as provided in

the Acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said Acts.

And your petitioners will ever pray.

Commerce Clearing House Inc.,
a corporation,
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

Andersen, Witte Engraving Co.,
a corporation,
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

W. L. Eckley,
By Samuel B. Blanksten,
His Attorneys in fact and duly authorized agent.

National Bureau of Property Administration, Inc., a corporation.
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

7 State of Illinois } ss.
County of Cook }

Samuel B. Blanksten, being first duly sworn, upon his oath deposes and says that he is the duly authorized agent of and attorney in fact for Commerce Clearing House, Inc., Andersen, Witten Engraving Co., W. L. Eckley, National Bureau of Property Administration, Inc., and has knowledge of the facts; that he has read the above and foregoing petition by him subscribed, knows the contents thereof, and that the same is true.

Samuel B. Blanksten.

Subscribed and sworn to before me this 3rd day of May, A. D. 1937.

Annetta Jacoby,
Notary Public.

(Seal)

May 18, 37. 8 And on, to wit, the 18th day of May, 1937, came the Alleged Bankrupt by its attorney and filed in the Clerk's office of said Court a certain Motion to Quash in words and figures following, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—65890) * *

MOTION TO QUASH THE ALLEGED SERVICE OF PROCESS AND RETURN THEREON AND TO VACATE ALL ORDERS HERETOFORE ENTERED.

Now comes the alleged bankrupt, Tax Service Association of Illinois, a corporation not for profit, organized and existing under and by virtue of the laws of the State of Illinois, by Luis Kutner, its attorney, appearing specially for the sole purpose of this motion only, to question the jurisdiction of this Court over its person and for no other purpose, and moves the Court to quash the pretended service of notice and process upon it in this cause and the return thereon, and to vacate all orders heretofore entered, upon the grounds and for the reasons following, to-wit:

1. Said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit and not a moneyed or business corporation within the scope of the Bankruptcy Act.

2. No process in this cause or any copy of notice in this cause has ever been served upon or delivered to said alleged bankrupt personally or to any of its duly authorized agents empowered to accept process or notice, notwithstanding the return made herein by William H. McDonnell, United
10 States Marshal, by E. Glaser, Deputy on subpoena issued on May 3, 1937, for Tax Service Association of Illinois, which return is set out in the affidavit of Roy G. Harris, attached hereto and made part hereof as if incorporated.

3. That notice of intention to file petition for receiver served on May 3, 1937, at 4:25 P. M., alleges that Ralph A. Simmons was secretary "to the best information, knowledge and belief, for the Tax Service Association"; that the said service of notice and of process served upon the said Ralph A. Simmons was improper, void and of no legal effect in that

the said Ralph A. Simmons at the time of said service of notice and process upon him was not associated with the Tax Service Association of Illinois in any capacity whatsoever, nor was he held out as such.

4. That the said Ralph A. Simmons did tender his resignation as secretary of the Tax Service Association of Illinois on March 13, 1937, which resignation was accepted in accordance therewith and entered upon the minutes of the corporation by resolution of its Board of Directors on March 15, 1937.

5. That the tender of resignation of the said Ralph A. Simmons and the acceptance thereof by the Tax Service Association of Illinois was within the knowledge of the National Bureau of Property Administration and other petitioning creditors and particularly their attorneys, Blanksten & Lansing.

6. That the service of notice and process upon the said Ralph A. Simmons in the matter herein was done wilfully and with total disregard of the legal rights of the alleged bankrupt, Tax Service Association of Illinois; that the petition in bankruptcy herein filed on May 3, 1937, was done with the intention to defeat justice in that it was done in the face of the decision handed down April 30, 1937, by the Appellate Court sitting in the First District of Illinois, reversing an order
11 of February 26, 1937, entered by Superior Court Judge Walter T. Stanton, Cook County, Illinois, holding that the appointment of a receiver on February 26, 1937, in a lawsuit wherein National Bureau of Property Administration was the Plaintiff and Tax Service Association of Illinois the Defendant, was done without jurisdiction; that all the orders entered by this court subsequent to the filing of the petition in bankruptcy herein should be vacated.

7. That on May 3, 1937, subsequent to the reversal by the Appellate Court of the case herein-above mentioned, the said Tax Service Association of Illinois appeared before the said Superior Court Judge Walter T. Stanton with a petition to vacate and set aside said order of February 26, 1937, and all subsequent orders in compliance with the decision of the said Appellate Court hereinabove mentioned but the said Superior Court Judge Walter T. Stanton, being advised in open court by counsel appearing for Blanksten & Lansing that the National Bureau of Property Administration contemplated and intended to carry out the preparation and filing of a petition for rehearing of said Appellate Court decision; and being so

advised the said Judge Stanton continued the aforesaid motion and petition of the Tax Service Association of Illinois until May 11, 1937.

8. That well knowing that the Tax Service Association of Illinois on May 11, 1937, was about to apply for an order before Superior Court Judge Walter T. Stanton to comply with the mandate of the Appellate Court, First District of Illinois, one of the petitioning creditors herein, National Bureau of Property Administration, along with other creditors, caused to be filed this petition in bankruptcy and obtained an order in this United States District Court, from this Honor-
12 able Court, enjoining the Superior Court Judge Walter T. Stanton from entering any orders in the receivership matter pursuant to the decision above mentioned and pending before the said Judge Stanton.

9. That the party in interest herein, the Tax Service Association of Illinois, has not absconded or is beyond the jurisdiction of the court nor cannot it be found; and the appointment of a receiver was improper in that there was no imminent danger or loss or great damage or irreparable injury or the greatest emergency.

10. That the service of notice and process upon Ralph A. Simmons, when reduced to its essentials is a scheme by the National Bureau of Property Administration and their attorneys, Blanksten & Lansing to defeat the ends of justice and wrecks the legitimate business of the alleged bankrupt, Tax Service Association of Illinois.

11. That the said Tax Service Association of Illinois is not nor was it ever insolvent nor has it ever committed any acts of bankruptcy.

12. In support of this motion the said Tax Service Association of Illinois presents the affidavit of itself by Roy G. Harris, president, and photostatic copies of the minutes of the acceptance of the resignation of Ralph A. Simmons and the tender of resignation of Ralph A. Simmons, and the envelope in which it was contained.

Luis Kutner,
Luis Kutner,
Attorney for Tax Service Association of Illinois, Appearing specially for the sole purpose of making this motion and for only that reason.

13 AFFIDAVIT OF ROY G. HARRIS.

State of Illinois, } ss.
County of Cook. }

Roy G. Harris, having been first duly sworn on oath deposes and says:

1. That he is a citizen and resident of Villa Park, DuPage County, State of Illinois.

2. That he is and has been since the 2nd day of July, A. D. 1935, the president of the Tax Service Association of Illinois, a corporation not for profit, organized under and by virtue of the laws of the State of Illinois, on the 29th day of January, A. D. 1932.

3. That the object of the Tax Service Association of Illinois is to render a complete service to its members, which shall include the appraisal of both real and personal property for the purpose of taxation; to examine and analyze real and personal property of its members and to report the status and condition thereof; to aid in contesting of the unfair and excessive taxes assessed against any of its members; to render to its members cooperative service in the purchase of supplies, materials, etc.; and to render such other services to its members as may from time to time be desirable.

4. That he has the authority to subscribe his name as president to the above motion to quash the alleged Service of Process and return thereon and to vacate all orders heretofore entered herein, and that he hereinafter subscribes the corporation's name by himself hereinabove and hereunto for the sole purpose of objecting to the jurisdiction of this Court over the person of the Tax Service Association of Illinois.

5. That no process in this case or any copy of notice in this case, has ever been served upon or delivered to said al-
14 leged bankrupt personally, or any of its duly authorized agents empowered to accept Service of Process, nothwithstanding the return made herein by William H. McDonnell, United States Marshal, by E. Glaser, Deputy, on subpoena issued on May 3, 1937, for Tax Service Association of Illinois, which return recites as follows:

"Served this Writ on the within named Tax Service Association of Illinois, a corporation, by delivering a copy thereof Ralph A. Simmons, Secy, an agent of said corporation this

10 day of May 1937. The president of said Corporation not found in my district.

Wm. H. McDonnell,
U. S. Marshal,
By E. Glaser,
Deputy.

Marshal's Fees	
1 Service	$2.00
1 Miles	.06
Total	$2.06"

6. That he is informed that notice of intention to file petition for receiver was served May 3, 1937, at 4:25 P. M., on one Ralph A. Simmons, wherein in affidavit of service it was alleged that Simmons was secretary "to the best information, knowledge and belief of the Tax Service Association".

7. That the Tax Service Association of Illinois and one of the petitioning creditors herein, National Bureau of Property Administration, has been associated with each other; that the petitioning creditor, National Bureau of Property Administration, and its attorneys herein, Blanksten & Lansing, well knew that the said Ralph A. Simmons was no longer associated with the Tax Service Association of Illinois since March 15, 1937; that the affidavit of service alleging that Simmons was the Secretary "to the best information, knowledge and belief, of the Tax Service Association of Illinois" was wilfully untrue and designed with the obvious intent and purpose to mislead and work a fraud upon this Court pursuant to the bad faith of the National Bureau of Property Administration in its continued campaign and conduct to plunder, pillage and wreck the Tax Service Association of Illinois.

15 8. That the said Ralph A. Simmons was not at the date of service of Notice and Process herein above set forth, the proper person or agent authorized or empowered to receive Notice for and on behalf of the Tax Service Association of Illinois, that on March 13, 1937, the said Ralph A. Simmons upon whom Process was served, tendered in writing his resignation to the directors of the Tax Service Association of Illinois, in words and figures as follows:

"March 13, 1937.

To
The Directors,
Tax Service Association of Illinois,
Chicago, Illinois.

Confirming my verbal statement to Mr. George P. Clayson, and the attorney accompanying him, on Saturday, March 13, 1937, I hereby tender my resignation as a director of and secretary of Tax Service Association of Illinois, and ask that said resignation be made effective immediately.

R. A. Simmons (Signature)"

9. That pursuant to the tender of resignation by the said R. A. Simmons, a special meeting of the Board of Directors of the Tax Service Association of Illinois, was held in Room 2010—33 North La Salle Street, Chicago, Illinois, at the hour of 11 o'clock A. M., on the 15th day of March, A. D. 1937, pursuant to the written waiver of notice.

10. That at the special meeting of said Board of Directors and upon motion duly made, seconded and unanimously carried, it was resolved that the resignation of R. A. Simmons, of date of March 13, 1937, as Secretary of Tax Service Association of Illinois, be accepted and incorporated in the minutes of the meeting..

11. That attached hereto are photostatic copies of the letter of resignation of R. A. Simmons, the envelope in which said letter of resignation was tendered, and the minutes of the meeting of the Board of Directors of the Tax Service
16 Association of Illinois showing the resolution that the resignation of said R. A. Simmons be accepted; that all of said photostatic copies are made a part hereof, hereby as if incorporated.

12. That, further, your affiant avers that he first learned of the filing of a petition in bankruptcy against the Tax Service Association of Illinois on May 6th, 1937.

13. That, further, your affiant avers that he at no time was informed or advised, either directly or indirectly, by the said R. A. Simmons, of the filing of a petition in bankruptcy hereinabove set forth.

14. That, further, your affiant avers that at no time were any Notices or Processes served upon him or any of the duly authorized agents or representatives of the Tax Service Association of Illinois.

15. That, further, your affiant avers that the parties in in-

terest herein have not absconded, nor are they out of the jurisdiction of this Court, or cannot be found.

16. That this petition in bankruptcy hereinabove mentioned was not filed in good faith in that the Tax Service Association of Illinois is not bankrupt, nor did it commit any acts of bankruptcy, nor is it insolvent within the purview of the Bankruptcy Statute, and that it is now willing and able to pay upon reasonable notice the just and provable claims of any creditors.

17. That, further, your affiant avers in support of his statement that the Tax Service Association of Illinois is not insolvent or bankrupt, but that in fact it now has assets consisting of cash, furniture and equipment, and accounts receivable, aggregating the sum of Twenty-Four Thousand ($24,000.00) Dollars, and that the just debts of the Tax Service Association of Illinois do not exceed Eight Thousand ($8,000.00) Dollars.

18. That, further, your affiant avers, in support of his statement, that the petition in bankruptcy was filed in bad
17 faith, that the National Bureau of Property Administration, one of the petitioning creditors herein, has for the past several months pursued a line of conduct, malicious and fraudulent, in its nature, designed for the purpose of gaining control, wrecking, pillaging and plundering of the Tax Service Association of Illinois, and attempting to place the officers of the Tax Service Association of Illinois in bad repute; that the National Bureau of Property Administration did cause to be filed a complaint in the Superior Court of Cook County, wherein it prayed for the appointment of a receiver admittedly for the dissolution and not for the conservation of the Tax Service Association of Illinois, and that the pleadings filed therein contained scandalous and libelous statements, and that on motion to vacate the orders by the Tax Service Association of Illinois, entered on February 26, A. D. 1937, was subsequently overruled; that on March 12, A. D. 1937, the Tax Service Association of Illinois filed notice of Interlocutory Appeal in the Appellate Court of Illinois, sitting in the First District of Illinois, that notwithstanding the notice of Interlocutory Appeal filed on March 12, A. D. 1937, the receiver appointed at the request of the National Bureau of Property Administration, did, on March 13, A. D. 1937, cause an order to be entered before his Honor, Walter T. Stanton, Judge of the Superior Court of Cook County, Illinois, wherein the receiver was authorized to do certain acts,

all to the detriment of the Tax Service Association of Illinois, and in a wilful disregard of the notice of Interlocutory Appeal; that on the 30th day of April, A. D. 1937, the Appellate Court reversed the order of February 26, A. D. 1937, entered by Judge Walter T. Stanton of the Superior Court of Cook County, Illinois, and held that that Court was without jurisdiction to enter the order of February 26, A. D. 1937, appointing a receiver for the defendant Association, Tax Service Association of Illinois.

18 19. That, further, your affiant avers that on May 11, A. D. 1937, after the expiration of the period for filing of a petition for rehearing before the Appellate Court of Illinois, First District, the attorney for the Tax Service Association of Illinois, appeared before his Honor, Judge Stanton in the Superior Court of Cook County, Illinois, filing motions to vacate the above mentioned order of February 26, A. D. 1937, and all subsequent orders, in compliance with the mandate of the Appellate Court hereinabove set forth; that on the following day when orders were presented to Judge Stanton by the attorney for Tax Service Association of Illinois, for signature, the attorneys for the National Bureau of Property Administration, being the same attorneys as are present in this Court representing the petitioning, alleged creditors, appeared in Judge Stanton's Court with an injunction issued by one of the Judges of the United States District Court, Northern District, Eastern Division, on the 12th day of May, A. D. 1937, restraining the Superior Court from entering any orders for the vacating as above mentioned.

20. That in view of the foregoing, your affiant further avers, that the petition in bankruptcy filed herein and appointment of the receiver pursuant thereto was done not according to law, in bad faith, and with undeniable intent and purpose to fraudulently consummate the plan to wreck, pillage and plunder the alleged bankrupt, Tax Service Association of Illinois.

And Further Your Affiant Sayeth Not.

Roy G. Harris,
Affiant.

Subscribed and Sworn to before me this 17th day of May, A. D. 1937.

Kathryn G. Lanahan,
Notary Public.

(Seal)

19 SPECIAL MEETING OF BOARD OF DIRECTORS OF TAX SERVICE ASSOCIATION OF ILLINOIS.

A special meeting of the Board of Directors of Tax Service Association of Illinois was held in Room 2010—33 North LaSalle Street, Chicago, Illinois, at the hour of 11:00 o'clock A. M., on the 15th day of March, A. D., 1937, pursuant to the written Waiver of Notice.

Roy G. Harris called the meeting to order. There were present at said meeting the following:

Roy G. Harris
George P. Clayson
Mildred P. Voigt

being all of the directors of the corporation by reason of the resignation of Clarence J. Meyer, dated March 12, 1937, and Ralph A. Simmons, dated March 13, 1937.

Said Waiver of Notice was presented to the directors by Roy G. Harris, Chairman of the meeting, and is as follows:

20 Waiver of Notice.

Chicago, Illinois, March 15, 1937.

We, the undersigned, being all of the directors of Tax Service Association of Illinois, by reason of the resignation of Clarence J. Meyer of date March 12, 1937, and Ralph A. Simmons of date March 13, 1937, hereby waive any and all notice required by law or by the Bylaws of the corporation, to a special meeting of the Board of Directors held at Room 2010—33 North LaSalle Street, Chicago, Illinois, at the hour of 11:00 o'clock A. M., on the 15th day of March, A. D., 1937, and consent that such meeting shall be held for the purposes of accepting the resignations of Clarence J. Meyer of date March 12, 1937 as Assistant Secretary, and that of Ralph A. Simmons of date March 13, 1937, as Secretary, and to fill the vacancies caused by said resignations; and to authorize the President and Secretary of said Association to execute, in the name of the said Association, as Principal, a Cost Bond with the Globe Indemnity Company of New York, as Surety, for the amount of $250.00, for the purpose of prosecuting an appeal in Case No. 37S-1716, in the Superior Court of Cook County, entitled, National Bureau of Property Administra-

tion, Inc. *vs.* Tax Service Association of Illinois, to the Appellate Court of Illinois, for the First District, and for such other business as may properly come before such meeting.

Roy G. Harris. (Signed)
George P. Clayson (Signed)
Mildred P. Voigt.

21 Roy G. Harris presented to the meeting the resignations of Clarence J. Meyer, of date March 12, 1937, as Assistant Secretary, and that of Ralph A. Simmons, of date March 13, 1937, as Secretary of Tax Service Association of Illinois.

Upon motion duly made, seconded and unanimously carried, it was

"Resolved; That the resignations of Clarence J. Meyer, of date March 12, 1937, as Assistant Secretary, and that of Ralph A. Simmons, of date March 13, 1937, as Secretary of Tax Service Association of Illinois, be, and they are hereby accepted by the Board of Directors of this corporation, and the same be, and they are hereby incorporated in the minutes of this meeting,

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22 March 12th, 1937.

To the Board of Directors
Tax Service Association of Illinois
228 North La Salle Street
Chicago, Illinois

Dear Sirs:

I herewith tender my resignation from the office of Assistant Secretary as well as my Directorship in the Tax Service Association of Illinois, to take effect immediately.

Clarence J. Meyer (Signed)
Clarence J. Meyer.

Copies to: Roy G. Harris
George Clayson
M. P. Voigt
R. Simmons
Tax Service Association of Ill.
Harold R. Schradzki.

23 March 13, 1937.

To
The Directors,
Tax Service Association of Illinois,
Chicago, Illinois.

Confirming my verbal statement to Mr. George P. Clayson, and the attorney accompanying him, on Saturday, March 13, 1937, I hereby tender my resignation as a director of and secretary of Tax Service Association of Illinois, and ask that said resignation be made effective immediately,

R. A. Simmons, (Signed)
R. A. Simmons.

24 Room 1308
189 W. Madison Street
Chicago, Illinois.

To the Directors:
Tax Service Association of Illinois,

(To be delivered at meeting called for March 15, 1937, at 11 a. m., in Room 2010—33 North LaSalle Street, Chicago.)

25 Roy G. Harris moved that George P. Clayson be elected Secretary of the Corporation.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: That George P. Clayson be, and he is hereby elected Secretary of Tax Service Association of Illinois."

Roy G. Harris then moved that Mildred P. Voigt be elected Assistant Secretary of the corporation.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: that Mildred P. Voigt be, and she is hereby elected Assistant Secretary of the Tax Service Association of Illinois."

Roy G. Harris stated that in his judgment it was for the best interest of the corporation that a certain Cost Bond in the amount of $250.00 be executed by the corporation in the prosecution of an appeal from an order appointing a Receiver for the said corporation, entered by Judge Walter T. Stanton on February 26, 1937, and suggested that said Cost Bond be executed by himself as President of the corporation and attested by George P. Clayson as Secretary, and that in view of the fact that the Corporate Seal was in the possession of Maurice J. Walsh, the attorney for the alleged Receiver,

that the said George P. Clayson be authorized and empowered to affix a facsimile of the seal of the said Tax Service Association of Illinois to the aforesaid Cost Bond.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: That Roy G. Harris, President of the corporation, be authorized to sign a Cost Bond in the amount of $250.00, for the purpose of prosecuting an appeal in Case No. 37S-1716, in the Superior Court of Cook County, Illinois, to the Appellate Court of Illinois, for the First District, and that a facsimile of the seal of said corporation may be affixed by George P. Clayson, Secretary, and attested by him, and that the same be done forthwith."

26 There being no further business to come before the meeting, the meeting was adjourned.

Roy G. Harris,
Chairman.

Attest:

Geo. P. Clayson,
Secretary.

27 And afterwards, to wit, on the 24th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered May 24, 1937

28 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and it appearing to the court that due notice of the presentation of the petition was served upon William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig and National Builders Bank of Chicago; and

The Court having read the petition and being fully advised in the premises;

It Is Ordered that:

1. Leave be and the same is hereby given to petitioners to file their petition instanter.

2. William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele and National Builders Bank of Chicago, a corporation, be made parties respondent to said petition.

3. William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig and the National Builders Bank of Chicago, a corporation, file their respective answers to said petition before 10:00 A. M. Thursday, May 27, 1937, and that the matter be set for hearing upon the petition and said answers before the Court at 10:00 A. M. Thursday, May 27, 1937.

Enter:

Philip L. Sullivan,
Judge.

May 24, 1937.

May 24. And on, to wit, the 24th day of May, 1937, came Avery Brundage Company, et al. by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

In the District Court of the United States.
(Caption—65890)

PETITION.

To the Honorable Judges of said Court:

Your petitioners, Avery Brundage Company, Dahl-Stedman Co., Henry Ericsson Company, The Lundoff-Bicknell Company, W. J. Lynch Company, H. A. Peters Co., Robert G. Regan Company, Rosenthal-Cornell & Co., The George Sollitt Construction Co. (formerly Ralph Sollitt & Son Contruct. Co.), J. W. Snyder Co., R. C. Wieboldt Co., Addison Heat En-

gineering Company, Adelman Heating Corp., Advance Heating & Air Conditioning Corp., also known as Advance Heating Company, Ajax Heating Co., Harry D. Allen, American Heating & Plumbing Corporation, J. F. Andler, doing business as J. F. Andler Heating Co., J. P. Baldwin Co., Barnes Heating Co., Ralph B. Barnes, David B. Bauld, doing business as David B. Bauld & Co., F. C. Black Company, William Borrman, doing busines as Beverly Heating Co., Louis
32 Brunner, doing business as Louis Brunner & Son, W. A. Bunge, P. H. Callahan, Chatham Heathing Co., Chicago Steam Heating Co., E. J. Claffey Co., Commonwealth Heating Co., Thomas Conlin Company, M. J. Corboy Co., Geo. H. Dahlquist & Co., also known as George H. Dahlquist, Davis Construction Co., Dougherty Brothers, Inc., Thos. J. Douglass & Co., Fred A. Ellis & Company, also known as Fred A. Ellis & Co., Inc., Gallaher & Speck, Wm. Gawne Company, Inc., also known as William Gawne, W. J. Gemeny Co., General Heating Corporation, Hugh F. Gillice, Glennon-Bielke Co., W. G. Glover, Inc., Robert Gordon, Inc., also known as Robert Gordon, W. B. Graves Heating Co., Hanley & Company, Hansen Brothers Engineering Company (E. N. Hansen and John N. Hansen), Harper and Barce, also known as Harper & Barce, Inc., Harrison-Spielmann Co., Heating Systems, Inc., Geo. A. Henrich Company, Arthur A. Helgert, doing business as Dearborn Heating Co., Horst Bros., also known as H. A. and C. A. Horst, Ideal Heating Company, Illinois Heating & Ventilating Company, Illinois Heating & Ventilating Company, Imperial Heating Co., Inland Heating Company, C. W. Johnson, Inc., Menua Johnson, Inc., Charles E. Jorgenson, doing business as Progressive Heating Co., Kohn Bros. Company, J. E. Kelleher, doing business as Kelleher Company (Not Inc.), H. W. Keppner, Inc., also known as H. W. Keppner, A. Kilander & Co., Wm. Klender & Co., Inc., Kroeschell Engineering Co., F. W. Lamb Company, William Lees, Inc., Elmer C. Lind, Edward H. Manz, doing business as Edw. Manz Heating Co., James H. McCauley, Inc., also known as J. H. McCauley, McDonald & Trunck Co., H. V. McKirnan, Mehring & Hanson Company, Avalon Heating Co., Inc., also known as Paul H. Miller, N. P. Miller, Nimmack Heating Co., Inc. also
33 known as C. Nimmack, F. E. Moran, Inc., R. J. Neuhaus Heating & Vent. Co., also known as H. J. Neuhaus, H. F. Newstedt and H. W. Newstedt, Northwestern Heating & Plumbing Co., J. H. Olson, Phillips, Getschow Co., William A.

Pope Company, Premier Engineering Co., Inc., L. H. Prentice Company, W. T. Reddy, S. J. Reynolds Co., Inc., Chas. A. Schiemann, Standard Piping Equipment Co., Ben Stevenson, Inc., also known as Ben Stevenson, Sunbeam Heating and Air Conditioning Company, William F. Thomsen, doing business as William Thomsen Co., Triangle Heating Co., Inc., Robert J. Tropf, Leo A. Wacholz, doing business as Wacholz Heating Co., W. J. Walsh & Co., Wendt & Crone Co., Wilbern & Fitzgerald, Wittenmeier Machinery Company, Anchor Sheet Metal Works, Louis Biegler Company, K. Hirsch & Son, C. E. Jensen & Sons, John Maier & Co., John P. Moos & Co., Inc., The Rude Company, Inc., L. N. Sohn & Co., Sykes Sheet Metal Products, Albert J. Wagner & Son, also known as Albert J. Wagner, Wagner Bros. Cornice Co., Herbert H. Davis Co., Inc., Gillispie-Dwyer Company, The Haines Company, R. B. Hayward Company, H. S. Kaiser Company, George E. Mathes, Nellish & Murray Co., Narowetz Heating & Ventilating Co., Reynolds Corporation, Standard Sheet Metal Co., Western Ventilating & Engineering Co., Kaiseraire Products Sales Co., also known as Kaiseraire Products Co., Davis Bros. Marble Co., Italian Marble Co., Henry Marble Co., Peerling Marble Company, Berry Bros., Aug. Burke Roofing Co., Jacobson Roofing Co., Inc., also known as Jacobson Roofing Co., Kafka Roofing Company, Jones & Cleary, doing business as Jones & Cleary Rfg. Co., Lincoln Roofing Co., Ralph Rackner, doing business as Ralph Rackner Roofing & Sheet Metals, South Shore Roofing Co., Inc., F. D. Renaud Roofing Company, also known as Renaud Roofing Co., F. A. Forester Roofing Co., also known as Forester Roofing Co., Knauf & Weber Roofing Co., also known as Knauf & Weber, Emil Anderson Company, Inc., also known as Emil Anderson & Co., E. L. Archibald Company, L. A. Ashbeck Co., Royal L. Brockob Construction Co., Oscar Burdlund, John W. Eder, John E. Ericsson Co., Ellington Miller Co., Warren B. Ewer Company, Charles F. Freutel Roofing Co., John Sebbardt & Son, E. C. Green Const. Co., Joseph Raigh & Sons Company, Hanson Brothers Company, Rudolph G. Heinkel, E. R. Heldmaier, Inc., Jacobson Brothers Co., also known as Jacobson Bros., Charles B. Johnson & Son, Inc., G. Kehl Sons, Krehl Construction Company, William Navor Company, Monke Schiller Co., Gerhardt F. Hoyne Company, also known as G. F. Hoyne Company, Fred Mraz & Son, Modern Roofing & Siding Co., N. E. Mueller Company, National Floor Co., Na-

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tional Power Construction Co., Poiret Construction Co., Otto Randolph, Incorporated, Sides Construction Co., E. W. Sproul Construction Company, Jacob Swanson & Sons, Inc., Mathias Tinnes, United Builders, Inc., R. D. Whitaker Company, James Wigginton, Edwin E. Young, Frank Burke & Son, S. N. Nielson, James Sheddon & Co., Acorn Wire & Iron Works,
Atlas Iron Works Corporation, Central Iron Works of
35 Chicago, Eggers Iron Company, also known as Eggers Iron Works, Enos Fire Escape Co., Federal Iron Works, Henry E. Gromp Co., Harris Preble Fire Doors, Inc., O. M. Hill Fire Door Mfg. Service, also known as Hill Fire Door Mfg. Service, Illinois Bronze & Iron Works, Chas. Johnson & Son Fire Escape Co., The Kawneer Company (Coleman Bronze Co.), also known as Kawneer Co., William F. Klemp Company, Mid-City Architectural Iron Co., New City Iron Works, F. P. Smith Wire & Iron Works, also known as R. F. Smith Wire & Iron Works, United Iron & Wire Co., Inc., also known as United Iron & Wire Works, Western Wire & Iron Works, Inc., Western Architectural Iron Co., also known as Western Architectural Iron Works, Wetzel Iron Works, R. M. Weyner Co., Woodbridge Orn. Iron Co., McNulty Bros. Co., M. Lamarche & Company, N. J. Parent Company, Alfred Carlson & Son, Bullivant Plastering Company, David J. Evans, Morgan & Porter, Harold I. Sutton, Burson Bros., Inc., also known as Burson Brothers, Howard F. Nolan, Wm. Brandenburg Co., R. H. Mathiesen, F. Westerberg & Son, Stout Plastering Co. (Charles R. Stout), Goss & Guise, William Adams & Son, Alcock Plumbing Co., William Blome, Samuel E. Brown, Chas. A. Burmeister, Kasper J. Cassnova, Maurice Casey, doing business as Casey Plumbing & Heating Co., Bernard Dentzer, Frank J. Dillenburg, John T. Dorsey & Son, Charles A. Dreier Co., George R. Dreyer, Inc., Dvorak & Gazin, Samuel Erman, George Feldkamp & Son, Charles E.
Gawne, Louis A. Goldacker, Gow and Davis, Paul Grosse,
36 William Gschwind, doing business as W. F. Gschwind & Son, Chas. D. Harris, Paul J. Hamer, Wm. P. Hodges, William H. Jones, E. B. Kaiser Co., Charles Kedl Co., Inc., Kedzie Plumbing & Heating Co., Peter King, John Kleker Plumbing Company, Ashland Plumbing & Heating Co. (J. H. Kravits), Elmer T. Larson, Frank J. Lasea, Thomas E. Litvin Plumbing Co., William D. Lucke, Chicago Plumbing & Heating Co. (Geo. H. Matthews), H. Mattull, doing business as F. E. Butts Plumbing Co., Walter E. McCarthy, Michael Mele, doing business as Mele Plumbing & Heating Service,

G. F. Mooney Co., also known as Gerald F. Mooney, Northern Plumbing & Heating Co., also known as Carl Lindblad, Emil E. Otto, N. L. Patterson, doing business as E. L. Patterson Plumbing & Construction Co., Peter N. Pinciak, Ben Pomerantz, William F. Powers, doing business as R. J. Powers & Co., A. L. Racine, also known as A. L. Racine, Inc., Max Raskin, also known as Bell Plumbing Co., Inc., H. P. Reger & Company, Roland-Sullivan Co., Herman C. Sievers, Arthur G. Siewerth, Henry Swede, Charles H. Thumm Co., Frank Tousek, Wm. S. Verity Sons, Adolph Walter, Jacob G. Weber Company, T. E. Whitchurch, M. F. Lynch & Co., and South Shore Plumbing Co., represent that:

37 1. They are now and have been for some years last past, engaged in Illinois in the several businesses of building, construction, steamfitting, plumbing, sheet metal, iron, steel, wire, ventilating, air conditioning, roofing, marble and plastering contractors, and in similar contracting businesses allied to the building trades.

2. Each of the petitioners is a member of one or more of the following Associations: Builders Association of Chicago, Chicago Master Steam Fitters' Association, Sheet Metal Contractors of Cook County, formerly called Associated Sheet Metal Employers of Chicago, Ventilating and Air Conditioning Contractors' Association, Chicago Marble Dealers' Association, Roofing Contractors' Association of Cook County, Associated Builders of Chicago, The Iron League of Chicago, Employing Plasterers' Asociation of Chicago and Plumbing Contractors' Association of Chicago.

3. In April, 1935, a certain document, called an agreement, was executed by the Tax Service Association of Illinois, alleged bankrupt herein, and by the Associations which purported to execute said agreement; and the amount thereto appearing on said agreement and purported to be signed by Benjamin F. J. Odell was signed by him. Said agreement is as follows:

38 For and in consideration of the mutual promises of each other, we and each of us this 9th day of April, 1935, hereby subscribe and pay the amount set opposite our respective names, the entire amount of our subscription, not less than Fifteen Hundred ($1,500.00) Dollars, to be used for the uses and purposes set forth in agreement attached hereto.

Name	Address	Amount
Building Construction Employers Association and affiliated associations whose signatures are attached hereto.		$1500.00

Memorandum of Agreement entered into this 9th day of April, 1935, by and between the Tax Service Association of Illinois and the respective subscribers whose names appear on the subscription page, attached hereto, and hereinafter referred to as subscribers, whereby it is agreed:

1st. The Tax Service Association of Illinois agrees to expend its efforts without delay to persuade the Department of Finance of the State of Illinois to change its present rulings concerning the application of the Illinois Retailers' Occupation Tax Act to said subscribers, and in such endeavors to work in cooperation with said subscribers and to retain on their behalf and for them, but without expense to them, attorney Benj. F. J. Odell, and on account of its costs and expenses said Tax Service Association agrees to accept the amount set opposite each subscriber's name, payable on the execution of this agreement, and in the event of a favorable ruling
39 from the Department of Finance and/or in the event of a favorable ruling after proceedings have been instituted in the State Court holding said subscribers exempt from said tax, and aditional sum equivalent to the calculated net savings to each subscriber on said tax for the two calendar months next preceding such saving, but not to exceed Fifteen Thousand ($15,000.00) Dollars. Should it became necessary to prosecute or defend an appeal to the Illinois Supreme Court, the Tax Service Association agrees to assist and aid the designated subscribers and their attorney, Benj. F. J. Odell, in such proceeding and the said subscribers agree, upon the rendering of a favorable decision by the Supreme Court, to pay the Tax Service Association the calculated net savings on said tax for the three calendar months next preceding such saving, but in no event shall total charges exceed Twenty Thousand Dollars ($20,000.00).

2nd. The subscribers agree to employ the Tax Service Association of Illinois for its services, etc., as above set forth, and to cause to be paid them therefor the respective amounts and at the time above set forth. The said subscribers further agree that such procedure will be followed as may from time to time be recommended by the Tax Service Association and Benj. F. J. Odell concerning filing of the monthly schedules required by the State of Illinois under the Occupation Tax Act, and the escrowing or depositing as may seem expedient of tax sums shown in such schedules, and to comply with such other requirements as may be from time to time advisable for

the payment of invoices from their suppliers directly or indirectly carrying the occupation tax.

3rd It is mutually agreed that no appeal will be taken to the Supreme Court following an unfavorable decision in the trial court without the approval and authority of a majority of the subscribers.

4th This agreement applies to respective certified Association members.

Witness our hands and seals the day and year first above written.

Tax Service Association of Illinois,
By (Signed) R. G. Harris (Seal)
Vice-President.
Building Construction Employers' Ass'n of Chicago, Inc.,
(Signed) Louis Narquetz,
President.
(Signed) E. M. Craig,
Secretary.

Attest:

(Signed) F. M. Voight
Secretary, Tax Service
Association of Illinois

Representing the following associations:

Builders Association of Chicago,
Chicago Master Steamfitters Ass'n (Seal)
Associated Sheet Metal Employers of Chicago
Ventilating and Air Conditioning Contractors Ass'n (Seal)
Fireproofing Contractors Ass'n of Chicago
Insulation Contractors Ass'n of Chicago (Seal)
Chicago Marble Dealers Association (Seal)
Roofing Contractors Ass'n of Cook County (Seal)

Erasures
O.K.
E. M. Craig
By HOH

I hereby consent to retention under the terms of this agreement. April 30, 1935. Benj. F. J. Odell.

41 Associated Builders of Chicago
By
William J. Keahl, (Seal)
President.
H. M. Stanton, (Seal)
Secretary.
The Iron League of Chicago (Seal)
F. E. Kahl, (Seal)
Pres.
A. C. Preble, (Seal)
Sec.
Employing Plasterers' Association of Chicago (Seal)
N. J. Peruet, (Seal)
Pres.
Percy G. Wold, (Seal)
Secty.
Plumbing Contractors Association of Chicago (Seal)
J. J. Hanley, Jr., (Seal)
Vice President.
Peter M. Hunn, (Seal)
Secretary.

42 4. At the time of, or shortly after, the execution of said agreement, some of the Associations which were named as "subscribers" thereto paid the Tax Service Association of Illinois Fifteen Hundred Dollars ($1500); and, pursuant to the terms of said agreement, the Tax Service Association of Illinois employed Benjamin F. J. Odell as attorney, and shortly thereafter, in April and May, 1935, some or all of the petitioners approved said agreement and consented to its terms, and some of the petitioners executed and sent to their respective Associations, which, in turn, delivered them to the Tax Service Association of Illinois and Odell, letters or documents reading as follows:

"I (or we) hereby approve the engagement of attorney Benjamin F. J. Odell to represent me (or us) in the proposed action of the Retailers' Occupation Tax, in accordance with the agreement entered into by me (our) Association."

5. The choice of said Benjamin F. J. Odell as the attorney to represent the petitioners in the proposed action to

have the petitioners held exempt from the imposition of the Illinois Retailers' Occupation Tax was requested by the Tax Service Association of Illinois, and petitioners are informed and believe, and upon such information and belief charge the fact to be that said Odell received part of the aforesaid Fifteen Hundred Dollars ($1500.00) paid to the Tax Service Association of Illinois, and had an agreement with said Tax Service Association of Illinois that he would receive part of the further amount to be paid to the Tax Service Association of Illinois under the terms of said agreement of April 9, 1935, in case a favorable decision exempting the contractors from said tax was obtained.

43 6. After the execution of said agreement of April 9, 1935, and at the time or shortly after the execution by some of the petitioners of the letters or documents set forth in Paragraph 4 hereof, the respective Associations of which petitioners were members, at the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell advised the petitioners to prepare returns as then required by the Illinois Retailers' Occupation Tax and the Illinois Department of Finance, together with copies of said returns, and to send said returns and copies thereof to their respective Associations or directly to the Tax Service Association of Illinois, together with checks for the amount of the taxes shown to be due on their respective returns, payable to the National Builders Bank Sales Tax Escrow Fund, and advised that said checks would be deposited in a certain account in the National Builders Bank of Chicago, said account to be known as the Sales Tax Escrow Fund. During the period from March 1, 1935, to April 1, 1937, the petitioners followed said advice and sent their tax returns, with copies thereof, and their checks payable to the National Builders Bank Sales Tax Escrow Fund for the amount of the taxes shown to be due on their respective returns, either to their respective Associations, which, in turn, turned said returns and copies thereof and said checks over to the Tax Service Association of Illinois, or directly to the Tax Service Association of Illinois.

7. After the said tax returns and copies thereof of the petitioners were received by the Tax Service Association of Illinois, said Tax Service Association of Illinois filed some of the originals of said returns with the Illinois Department of Finance, but did not file some of said original returns, and

44 kept in its possession the original returns which it did not file, together with the copies of all of said returns

delivered, as aforesaid, to the Tax Service Association of Illinois. The originals of petitions' returns which were not filed with the Illinois Department of Finance, and the copies of all of said returns, are now in the possession or control of William L. O'Connell, Jr., receiver of the Tax Service Association of Illinois, the alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell, or one or more of them. The checks of petitioners accompanying said returns were deposited by the Tax Service Association of Illinois in a certain account in the National Builders Bank of Chicago, known as the Sales Tax Escrow Fund.

8. Said Sales Tax Escrow Fund in the National Builders Bank of Chicago, so far as the National Builders Bank of Chicago is concerned, was created and controlled by a letter to said Bank signed by E. M. Craig, H. O. Harris and Benjamin F. J. Odell, the original of which letter is in the possession of said bank. Said letter is as follows:

"May 2nd, 1935

National Builders Bank of Chicago,
On the Wacker Drive at LaSalle,
Chicago, Illinois

Gentlemen:

There has been opened with you this a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account, certain cheques for various amounts issued by sundry contractors.

You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois.

45 Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each cheque must bear the signature of either: Benj. F. J. Odell, or Ruth V. Willner; and R. G. Harris, or P. M. Weaver, together with E. M. Craig, or R. D. Steele.

(Signed)
Benj. F. J. Odell,
R. G. Harris,
E. M. Craig."

9. The petitioners consented to the establishment of said so called Escrow Fund, and sent their checks to be deposited in said account, for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois the respective taxes shown to be due in their respective returns, hereinabove described, if the Illinois Department of Finance and the courts decided that the petitioners were not exempt from said tax; and the petitioners consented to the establishment of said account and sent their checks to be deposited in said account, pursuant to the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell, whose relations with and connection with the petitioners were created and limited solely by the aforesaid agreement of April 9, 1935, and the said letters and documents executed by petitioners, set forth in Paragraph 4 hereof. In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, and said Craig was also acting as the representative of the Building Construction Employers' Association and the other Associations who were "subscribers" to said agreement of April 9, 1935, and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, the other party to said agreement of April 9, 1935. All of the monies deposited by the petitioners in
46 said account in the National Builders Bank of Chicago, known as the Sales Tax Escrow Fund, were at the time of their deposit and at all times since, and are now solely the monies of petitioners, in which monies neither the Tax Service Association of Illinois, William L. O'Connell, Jr., receiver of said Tax Service Association of Illinois, R. G. Harris, Benjamin F. J. Odell or E. M. Craig, have any right or interest, but said Odell, Harris and Craig have the duty to disburse that part of the Fund deposited by petitioners in accordance with the directions and request of petitioners.

10. There was deposited in said Sales Tax Escrow Fund, and there is now in said Fund in the National Builders Bank of Chicago, Three Hundred Fourteen Thousand Eight Hundred Eighty-Five Dollars and Ninety-Five Cents ($314,885.95). Of this amount there was deposited in said Fund by the petitioners, and there is now in said Fund belonging to the petitioners, Two Hundred Ninety-Seven Thousand Five Hundred Thirty-Four Dollars ad Seventy-Nine Cents ($297,534.79), or slightly in excess thereof. The exact amount deposited

from time to time in said Fund by each of the petitioners is shown on the books and records kept by the Tax Service Association of Illinois as a part of the service it was supposed to render under said agreement of April 9, 1935. Your petitioners have been informed that the books and records of the Tax Service Association of Illinois showing the exact amount deposited by each of the petitioners from time to time in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, are now in the possession and control of Benjamin F. J. Odell.

47 11. Subsequent to the execution of the agreement of April 9, 1935, the Tax Service Association of Illinois and Benjamin F. J. Odell attempted to persuade the Department of Finance of the State of Illinois to change its then rulings concerning the Illinois Retailers Occupation Tax on the petitioners and other contractors; that the efforts of the Tax Service Association of Illinois and said Odell in that regard failed to effect a change in the rulings of the Illinois Department of Finance; that subsequently, and in pursuance of said agreement of April 9, 1935, the Tax Service Association of Illinois and said Odell, on the 4th day of September, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, entitled Blome, et al. *vs.* Ames, et al., No. 35C 13839, in which suit said Tax Service Association of Illinois and Odell made most of your petitioners and other contractors parties plaintiff. In said suit plaintiffs prayed for an injunction to restrain K. L. Ames as Director of Finance of the State of Illinois, and Otto Kerner, as Attorney General of the State of Illinois, from assessing and collecting an Illinois Retailers' Occupation Tax against the plaintiffs, upon the ground that the plaintiffs were exempt from payment of said tax; that on June 30, 1936, a decree was entered by said Circuit Court of Cook County, dismissing the bill of the plaintiffs in said suit for want of equity; that thereafter the Tax Service Association of Illinois and Benjamin F. J. Odell prosecuted an appeal from said decree of the Circuit Court of Cook County, in said case No. 35C 13839, to the Supreme Court of the State of Illinois; that said appeal was decided and an opinion rendered by the Supreme Court of Illinois on February 18, 1937, which opinion is reported in 365 Illinois Supreme Court Reports, 456; that the Supreme
48 Court of Illinois decided in its opinion that the plaintiffs in said case, including the petitioners, were not exempt from the payment of the Illinois Rteailers' Occupation Tax.

On April 2, 1937, pursuant to the mandate of the Supreme Court of Illinois, a final decree was entered in the Circuit Court of Cook County in said case No. 35C 13839, which said final decree provides, among other things, that the plaintiffs in said cause, and each of them, make the returns required of them by the Illinois Retailers' Occupation Tax, and pay to the Department of Finance of the State of Illinois on or before the expiration of Sixty (60) days from the entry of the decree (Sixty (60) days from April 2, 1937, or by June 1, 1937), all taxes which shall have become due from them respectively to the State of Illinois, under the provisions of said Retailers' Occupation Tax, prior to the time of the entry of said decree, and which are then due and unpaid, together with interest on the several amounts from and after the date or dates upon which said several amounts shall have become due and payable under the provisions of said Act or the then decree to the date of the payment thereof, at the rate of Three per cent (3%) per annum; and said decree further provides that if the plaintiffs shall fail and neglect to make said returns or to pay to the Department of Finance of the State of Illinois the full amount of said taxes and said interest thereon, as therein provided, within said period of Sixty (60) days from the entry of said decree, the injunction order entered in the decree restraining the Director of Finance and the Attorney General from applying or enforcing the penalty and interest provisions of said Act, shall be dis-
49 solved and shall be of no further force or effect. The penalty provided by the Illinois Retailers' Occupation Tax is Twenty-Five per cent (25%) of the amount of the tax assessed, and the interest under the Act is Five per cent (5%) per annum upon the tax assessed.

12. All relations of the Tax Service Association of Illinois and said Harris and said Odell with your petitioners, under said agreement of April 9, 1935, and the letters or documents executed by some of the petitioners, set forth in Paragraph 4 hereof, and all services rendered and to be rendered to your petitioners by said Tax Service Association of Illinois, said Harris and said Odell, terminated and were concluded upon the entry of the final decree entered on April 2, 1937, in the Circuit Court of Cook County, Illinois, in the case of Blome, et al. *vs.* Ames, et al., No. 35C 13839, pursuant to the mandate of the Supreme Court of Illinois.

13. On account of the great number of your petitioners,

and for other reasons, each of the petitioners has, by written authorization dated May 7, 1937, authorized George V. Dahl, Henry P. Reger and Louis Narowetz, Sr. as a Special Committee on Illinois Retailers' Occupation Tax, to act on his or its behalf in connection with all matters relating to or arising out of the opposing by said petitioners and other contractors and Associations of the imposition of the Illinois Retailers' Occupation Tax on contractors, and relating to or arising out of the participation by said petitioners in the case of Blome et al, *vs.* Ames, et al., Circuit Court No. 35C 13839, and each said petitioner has further specifically authorized said Committee to arrange with the Illinois Department of Finance for the payments due for said tax from said contractors, including the said petitioners who were parties to said law suit, and to make said payments; to make any compromise or adjustments with the Department of Finance in regard to such payments, which the Committee may deem advisable; to make such distribution of the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago as the Committee shall deem to the best interests of said contractors, including the said petitioners; to incur such expenses, including attorneys' fees, as may be necessary in order to protect the interests of said Associations and said contractors and said Escrow Fund; to terminate all relations with any attorney heretofore representing the said petitioners in said law suit; and to institute or defend such law suits in behalf of said Associations and said contractors, including the said petitioners, as may be necessary or advisable in the judgment of the Committee to protect the interests of said Associations or said contractors.

14. The petitioners, acting by and through the said Special Committee on Illinois Retailers' Occupation Tax, on May 10, 1937, requested Benjamin F. J. Odell to cease from acting as attorney or representative of the petitioners, and to do nothing further on behalf of any of them; and requested and demanded said Odell to turn over to said Committee at once, all papers, documents and data, including among other things, the originals and copies of the Illinois Retailers' Occupation Tax returns of the petitioners, which said Odell has in his possession or in his control, pertaining to or connected with the Illinois Retailers' Occupation Tax, from the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court

No. 35C 13839, and the appeal from the decree in said suit;
51 and requested and demanded that said Odell, as one of the parties on whose order withdrawal can be made from the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago, pursuant to said letter of May 2, 1935, execute a check to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee on Illinois Retailers' Occupation Tax, for the amount in said Sales Tax Escrow Fund deposited therein by the petitioners, amounting to in excess of Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500.00), or that in lieu thereof said Odell execute a document wtihdrawing his name and that of Ruth V. Willner, as parties one of whose signatures must be on any check drawn on such Fund, to the extent of the amount in said Sales Tax Escrow Fund deposited therein by the petitioners.

Said Odell refused to turn over to the petitioners or to the said Special Committee on Illinois Retailers' Occupation Tax, designated as aforesaid by your petitioners, any of said papers, documents and data, and refused to comply with petitioners' request and demand concerning the said Sales Tax Escrow Fund.

15. The petitioners, acting by and through the said Special Committee on Illinois Retailers' Occupation Tax, on May 19, 1937, requested R. C. Harris to cease from acting for or representing any of the petitioners, and to do nothing further on behalf of any of them; and requested and demanded said Harris to turn over to said Committee at once, all papers, documents and data, including, among other things, the originals and copies of the Illinois Retailers' Occupation Tax, returns of the petitioners which said Harris has in his possession or in his control, pertaining to or connected with the Illinois Retailer's Occupation Tax, from the period from May 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court
52 No. 35C 13839, and the appeal from the decree in said suit; and requested and demanded that said Harris, as one of the parties on whose order withdrawal can be made from the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago, pursuant to said letter of May 2, 1935, execute a check to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee on Illinois Retailers' Occupation Tax, for the amount in said Sales Tax Escrow Fund deposited therein by the petitioners,

amounting to in excess of Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500.00), or that in lieu thereof said Harris execute a document withdrawing his name and that of P. M. Weaver, as parties one of whose signatures must be on any check drawn on such Fund, to the extent of the amount in said Sales Tax Escrow Fund deposited therein by the petitioners.

Said Harris refused to turn over to the petitioners or to the said Special Committee on Illinois Retailers' Occupation Tax, designated as aforesaid by your petitioners, any of said papers, documents and data, and refused to comply with petitioneers' request and demand concerning the said Sales Tax Escrow Fund.

16. Petitioners further represent that said E. M. Craig, who is one of the signers of said letter of May 2, 1935, addressed to the National Builders Bank of Chicago, is ready, willing and eager to comply with any request of your petitioners in regard to the disposition of the monies deposited by them in said Sales Tax Escrow Fund, and to release or disburse said monies in said Fund in accordance with the desires of your petitioners.

53 17. Said William L. O'Connell, Jr., receiver of the Tax Service Association of Illinois, has informed your petitioners that the Tax Service Association of Illinois has failed to turn over to him any of the papers, documents and data pertaining to or connected with the Illinois Retailers' Occupation Tax on the petitioners, for the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court No. 35C 13839, and the appeal from the decree in said suit, and that he has none of said papers, documents or data in his possession. Said O'Connell has further informed your petitioners that he has made demand upon said Odell for said papers, documents and data, and that said Odell has not complied with said demand, and that he has attempted to make demand upon said Harris for said papers, documents and data.

18. Your petitioners say that the originals of the Illinois Retailers' Occupation Tax returns prepared by petitioners and delivered to the Tax Service Association of Illinois and which were not filed by the Tax Service Association of Illinois and are now in the possession or under the control of the Tax Service Association of Illinois, said Harris and said Odell, or one or more of them, and also the copies or dupli-

cates of all of the Illinois Retailers' Occupation Tax returns prepared by petitioners and delivered to the Tax Service Association of Illinois, and which are now in the possession or under the control of the Tax Service Association of Illinois, said Harris and said Odell, or one or more of them, are the property of petitioners, and none of said Tax Service Association of Illinois, Odell or Harris, nor William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois,
54 has any interest therein or right of possession thereto, and all of the same should be delivered instanter to the petitioners by delivery to the said Special Committee on Illinois Retailers' Occupation Tax, which Committee represents the petitioners and is hereby authorized by the petitioners to receive said returns and copies thereof.

The books, records and accounts of the Tax Service Association of Illinois upon which are shown all matters relating to the Sales Tax Escrow Fund and how much was deposited from month to month by each of the petitioners in said Sales Tax Escrow Fund belong to and should be delivered instanter to William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, by whomsoever has possession of the same, and should be open for inspection, examination and copying by petitioners.

19. The aforesaid Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) deposited in the Sales Tax Escrow Fund by the petitioners is, as above set forth, the sole property of the petitioners and was deposited by them for the purpose of paying the Illinois Retailers' Occupation Tax on petitioners for the periods for which said monies were deposited. Petitioners desire to pay to the Department of Finance of the State of Illinois the Illinois Retailers' Occupation Tax which petitioners believe to be due from them for the period from March 1, 1935, to April 1, 1937, and for that purpose petitioners require at once the said Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($279,534.79) or the greater part thereof. In order to make the payments for said period which they believe to be due from them, petitioners also require at once the originals of the returns pre-
55 pared by them and delivered to the Tax Service Association of Illinois and not filed with the Illinois Department of Finance, and the copies or duplicates of all of the returns prepared by them for said period and delivered to the Tax Service Association of Illinois, and petitioners also require at once an inspection of the books, records and accounts of the

Tax Service Association of Illinois showing how much was deposited by each of your petitioners from month to month in said Sales Tax Escrow Fund.

20. If petitioners fail to pay, on or before June 1, 1937, the Retailers' Occupation Taxes owing by them for the period from March 1, 1935, to April 1, 1937, (and they will so fail and will be unable to pay said taxes unless the monies of the petitioners in said Sales Tax Escrow Fund are turned over to petitioners instanter and unless the aforesaid tax returns and copies thereof of petitioners are immediately turned over to them and unless they are permitted to make said inspection of the books, records and accounts of the Tax Service Association of Illinois, as above set forth) petitioners probably will be subjected to the payment of the Retailers' Occupation Tax owing by them for said period, together with a penalty of twenty-five per cent (25%) thereof and five per cent (5%) interest per annum thereon, until paid. The petitioners are unable to pay the amount of taxes for said period which they believe to be due, except with the monies of petitioners in said Sales Tax Escrow Fund.

Petitioners further say that unless the monies of petitioners in said Sales Tax Escrow Fund are turned over to petitioners instanter, and unless said books, records, documents and data aforesaid are turned over to them instanter, and unless they are permitted at once an inspection of the books,
56 records and accounts of the Tax Service Association of Illinois showing the respective amounts deposited by each of said petitioners in said Sales Tax Escrow Fund, they will be damaged in excess of One Hundred Thousand Dollars ($100,000) and will be otherwise irreparably damaged.

Wherefore, your petitioners pray:

1. That this Court order William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele, National Builders Bank of Chicago, corporation, be made parties respondent to this petition.

2. That this Court order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illi-

nois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago and deliver said check instanter to said Special Committee or any member thereof or to Sigmund W. David, attorney for petitioners; and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, and presentation of said check for payment; that the Court further order that, if Benjamin F. J. Odell does not sign said check instanter, Ruth V. Willner sign the same, and that, if R. O. Harris does not sign said check instanter, P. M. Weaver sign the same.

57 That the Court further order that, if said check so executed is not delivered to the persons or person named above within the time specified by the Court, a check for said amount to said payees and drawn on said fund in said bank shall be signed by any one or more of said Benjamin P. J. Odell, R. O. Harris and E. M. Craig and delivered to the persons or person named above, and said National Builders Bank of Chicago shall honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, and presentation of same for payment, the same as if said check were signed jointly by all three of said Benjamin F. J. Odell, R. G. Harris and E. M. Craig.

3. That the Court order that William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell, their respective agents, employees and representatives, turn over and deliver instanter to petitioners by turning over and delivering to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, or to any member of said Committee or to Sigmund W. David, attorney for petitioners, all papers, documents and data pertaining to or connected with the Illinois Retailers' Occupation Tax

58 on petitioners, or any of them, for the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the participation of the petitioners, or any of them, in the law-suit of Blome, et al. *vs.* Ames, et al., Circuit Court of Cook County No. 35C 13839, and the appeal from the de-

cree in said suit, including the originals and copies of the Illinois Retailers' Occupation Tax returns of the petitioners for said period from March 1, 1935, to April 1, 1937, which they have in their possession or under their control.

4. That the Court order that the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell turn over and deliver instanter to William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, all books, records and accounts of the Tax Service Association of Illinois showing or pertaining to the amounts paid from time to time by the petitioners, and any of them, into the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and that upon receipt of said books, records and accounts the Receiver permit petitioners, by said Special Committee on Illinois Retailers' Occupation Tax or by Sigmund W. David, attorney for petitioners, or by the duly authorized agent of said Committee or said attorney, to inspect, examine and copy all or any part of said books, records, documents and accounts.

5. That the Court grant such further relief to the petitioners as may be necessary in the premises.

59 George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee, are hereby designated as the agents and representatives of the petitioners, and each of them, for any or all purposes relating to or connected with the matters set forth in this petition, and said Committee has been given the power and authority of the petitioners, and each of them, as heretofore set forth.

Avery Brundage Company and the other individuals, partnerships and corporations whose names are set forth as petitioners in the beginning of this petition,

Petitioners,

By Geo. H. Dahl,
Henry P. Reger,
Louis Narowetz,
Special Committee on Illinois Retailers' Occupation Tax authorized to act for and sign this petition on behalf of all of the petitioners whose names are set forth in the beginning of this petition.

Sigmund W. David,
Attorney for Petitioners.

60 State of Illinois, } ss.
County of Cook. }

George V. Dahl, being first duly sworn, on oath deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named, and that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as the Special Committee on Illinois Retailers' Occupation Tax and authorized to act on behalf of petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf, and makes this affidavit on behalf of all of said petitioners. Affiant further says that he has read the above petition and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge and belief, except those matters and things which are stated to be upon information and belief, and those matters and things affiant believes to be true.

Further affiant sayeth not.

Geo. V. Dahl.

Subscribed and sworn to before me this 21st day of May, A. D. 1937.

James J. Glassner,
(Seal) *Notary Public.*

d May 26, 937. 61 And on, to wit, the 26th day of May, 1937, came the Petitioning Creditors by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

62 In the District Court of the United States.
* * (Caption—65890) * *

ANSWER OF THE PETITIONING CREDITORS TO PETITION OF AVERY BRUNDAGE COMPANY, ET AL.

The petitioning creditors, Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, answering the petition of Avery Brundage Company, et al. state that they

neither admit nor deny each and all of the allegations in the said petition contained, and demand strict proof thereof.

Commerce Clearing House, Inc., a corp.,
Anderson, Witte Engraving Co., a corp.,
W. L. Eckley, an individual,
National Bureau of Property Administration, Inc., a corporation,
By Blanksten & Lansing,
Their Attorneys.

63 And afterwards, to wit, on the 27th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered M 27, 193

64 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:

In the certain account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago there is
65 now on deposit the sum of Three Hundred Fourteen Thousand Eight Hundred Eighty-five Dollars and Ninety-six Cents ($314,885.96), as alleged in the petition of petitioners; that the greater portion of said Sales Tax Escrow Fund is the proceeds of checks of the petitioners which were deposited in said Sales Tax Escrow Fund; that the amount thereof claimed by petitioners to be the proceeds of their checks, so deposited, being Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine

Cents ($297,534.79); and that the amount in said Sales Tax Escrow Fund not representing the proceeds of petitioners' checks represents the proceeds of checks of other contractors, which other contractors are represented by Benjamin F. J. Odell, and on their behalf consents to the entry of this order;

It Is Hereby Ordered, Adjudged and Decreed:

1. That there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of Finance of the State of Illinois, to apply on account of principal and interest owing by the petitioners and the said other contractors for their respective Illinois Retailers' Occupation Taxes for the period from March 1, 1935, to April 1, 1937, seventy-five per cent (75%) of the proceeds of checks of each said petitioner and each said other contractor deposited in said fund, which said seventy-five per cent (75%) aggregates Two Hundred Thirty-six Thousand One Hundred Sixty-four Dollars and Forty-six Cents ($236,164.46), plus an amount approximating interest on seventy-five per cent (75%) of the proceeds of checks of each
66 said petitioner and each said other contractor deposited in said fund from time to time, at the rate of three per cent (3%) per annum to this date, which said interest approximates Six Thousand Thirty-five Dollars and Fifty-four Cents ($6,035.54); and that, therefore, there be paid instanter to the Department of Finance of the State of Illinois out of said Sales Tax Escrow Fund in said bank a total of Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200).

2. That Benjamin F. J. Odell, R. G. Harris and E. M. Craig sign instanter a joint check for Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) payable to the order of the Department of Finance of the State of Illinois, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig", and deliver said check instanter to the Department of Finance of the State of Illinois for the aforesaid purposes, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago, upon endorsement of said check and upon presentation of said check for payment.

3. That within five (5) days the petitioners furnish to the above named respondents an itemized statement showing the amount that each of said petitioners claims to have deposited

in said Sales Tax Escrow Fund, and that said list and the amounts thereof be examined and checked by Benjamin F. J. Odell, and that he report the result thereof to Sigmund W. David, attorney for petitioners, and that if there be any differences between the figures furnished by the petitioners and the figures in the hands of Benjamin F. J. Odell, said differences be determined by this court.

67 4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.

5. That the time for William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee Wm. F. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto.

Enter:

Philip L. Sullivan,
Judge.

May 27, 1937.
Approved:
Sigmund W. David,
Attys. for Petitioners.
E. M. Craig,
William J. Flaherty,
Atty. for Wm. L. O'Connell, Jr. as Rec., etc.
Luis Kutner,
for Tax Service Association of Illinois.
R. G. Harris,
Benjamin F. J. Odell,
National Builders Bank of Chicago,
by Louis A. Bowman,
Ass't. Cashier.
Blanksten & Lansing,
Attys. for Petitioning Creditors.

ed May 1937.

68 And afterwards, to wit, on the 27th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

69 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

Thursday, May 27, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

It Is Ordered by the Court that the Order heretofore entered herein May 18, 1937 referring this cause to Referee Streeter be and the same is hereby vacated and set aside and It Is Further Ordered that this cause be and the same is hereby referred to Referee William L. Sullivan.

May 26, 37.

151 And on, to wit, the 26th day of May, 1937, came the Petitioning Creditors by their attorneys and filed in the Referee's office of said Court a certain Motion in words and figures following, to wit:

152 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

MOTION OF THE PETITIONING CREDITORS TO STRIKE SPECIAL APPEARANCE AND DISMISS ALLEGED BANKRUPT'S MOTION.

Now come Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, petitioning creditors in the above entitled matter, by Blanksten & Lansing, their attorneys, and respectfully move the Court to strike from the files the purported special appearance of the alleged bankrupt, Tax Service Association of Illinois, a corporation, and for an order directing the said purported special appearance and motion and affidavit in support thereof to stand as the general ap-

pearance of the said alleged bankrupt in this matter, and for a further order dismissing the Motions of the said alleged bankrupt To Quash Service and Vacate all Orders heretofore entered herein, and as grounds for this motion the petitioning creditors set forth the following:

1. The purported special appearance of the alleged bankrupt constitutes in law and in fact a general appearance of the said alleged bankrupt although containing purported words of reservation.

2. The alleged bankrupt has appeared generally in this cause and has waived all matters or objections with reference to jurisdictions of the Court in that by its purported spe-
153 cial appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, it has pleaded to the merits of the Petition in Bankruptcy heretofore filed in this matter in the following respects:

(a) In the alleged bankrupt's Motion to Quash and to Vacate Orders, the said alleged bankrupt pleads to the Petition in Bankruptcy by answering and denying material allegations therein and joining issue thereon when, in Paragraph one (1) of its said purported Motion, it denies that it is a corporation within the scope of the Bankruptcy Act, and states as follows:

"Said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit and not a monied or business corporation within the scope of the Bankruptcy Act."

(b) The alleged bankrupt further joins issue and pleads to the Petition in Bankruptcy when, in Paragraph eleven (11) of its purported Motion, it denies insolvency and denies the acts of bankruptcy charged against it in the Petition in Bankruptcy in the following manner:

"That the said Tax Service Association of Illinois is not, nor was it ever insolvent, nor has it ever committed any acts of Bankruptcy."

3. The alleged bankrupt has waived any and all objections and questions of jurisdiction and has generally appeared by reason of the further fact that in the affidavit of its President, Roy G. Harris, attached to and made an integral part and portion of its purported Motion to Quash and Vacate Orders, it has pleaded generally to the merits of the Petition in Bankruptcy traversing the allegations of insolvency and the
154 Acts of Bankruptcy charged in the following manner, to wit:

(a) In said affidavit, at Page four (4) thereof, in Paragraph sixteen (16), the President of the said alleged bankrupt (who, incidentally, states in Paragraph four (4) of said affidavit, that he subscribes the corporation's name by himself for the purpose of objecting to the jurisdiction of this Court), pleads generally to the merits of the petition by denying the material allegations thereof in the following manner:

"That this Petition in Bankruptcy hereinabove mentioned was not filed in good faith in that the Tax Service Association of Illinois is not bankrupt, nor did it commit any acts of bankruptcy, nor is it insolvent within the purview of the Bankruptcy Statute * * *."

(b) Further, on Page four (4) in Paragraph seventeen (17) thereof, the alleged bankrupt by and through its President, further denies insolvency and joins issue with the original Petition in Bankruptcy in the following manner:

"That further your affiant avers in support of his statement, that the Tax Service Association of Illinois is not insolvent or bankrupt, but that in fact it now has assets consisting of cash, furniture and equipment, and accounts receivable, aggregating the sum of Twenty-four Thousand ($24,000.00) Dollars, and that the just debts of the Tax Service Association of Illinois do not exceed Eight Thousand ($8,000.00) Dollars."

4. The said purported Motion to Quash and affidavit in support thereof contain various and sundry scandalous, impertinent and redundant statements and allegations which further serve to join issue in the merits of this cause, and to vitiate any purported attempt on the part of the alleged bankrupt to appear specially for the purpose of urging jurisdictional objections.

155 5. The purported special appearance, Motion to Quash and Vacate and affidavit in support thereof constitute a general appearance of the alleged bankrupt, and a waiver of any and all jurisdictional objections for other good and sufficient reasons appearing upon the face of the said purported special appearance, Motion to Quash and Vacate and affidavit in support thereof.

The petitioning creditors, therefore, respectfully move the Court to enter the following findings and orders with respect to the alleged bankrupt's purported special appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, to-wit:

1. Finding that the purported special appearance, Motion

to Quash and Vacate Orders and affidavit in support thereof of the alleged bankrupt constitute a general appearance of the alleged bankrupt in this cause.

2. An order striking from the files the purported special appearance of the alleged bankrupt and declaring the said alleged bankrupt to have appeared generally in this cause.

3. A finding that the alleged bankrupt has, in and by its purported special appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, failed to confine itself to an objection or objections to jurisdiction, but has in addition pleaded generally to the merits of the original Petition in Bankruptcy traversing the allegations of insolvency and the acts of bankruptcy charged, and hence notwithstanding any reservation which the said alleged bankrupt may have attempted to make, has waived all special or personal privileges in respect to the jurisdiction of this Court, and any and all other jurisdictional objections or matters.

4. That the said alleged bankrupt has, in and by its general appearance aforesaid, waived the following jurisdictional objections, to-wit:

156 (a) The purported objection that service of notice of the application by the petitioning creditors for the appointment of a Receiver was not had upon a proper officer or duly authorized agent of the alleged bankrupt such as would charge the said alleged bankrupt with notice thereof.

(b) The purported objection that service of the subpoena under the original Petition in Bankruptcy in this cause was not had upon a proper officer or duly authorized agent of the alleged bankrupt such as would charge the alleged bankrupt with due and proper notice.

(c) The purported objection that this Court does not have jurisdiction of the alleged bankrupt for the reason that it is a not for profit corporation and not a monied or business corporation within the scope of the Bankruptcy Act.

(d) All other purported objections touching the jurisdiction of the Court in this matter.

And that this Court may enter such other and further findings and orders as are appropriate and necessary in the premises.

Commerce Clearing House, Inc., a corporation,
Andersen, Witte Engraving Co., a corporation,
W. L. Eckley, an individual,
National Bureau of Property Administration, Inc., a corporation,

By Blanksten & Lansing,
Their Attorneys.

157 State of Illinois } ss.
County of Cook }

Harold S. Lansing, being first duly sworn, upon his oath deposes and says that he is associated with the law firm of Blanksten & Lansing, the attorneys for the petitioning creditors in the above entitled matter; that he has conducted a thorough and exhaustive search of the law and authorities applicable to the questions involved, and is of the opinion that the above and foregoing motion to strike and dismiss is well-founded in law.

Affiant further states that this motion to strike and dismiss is not interposed for delay or any other dilatory purpose.

Further this affiant sayeth not.

Harold S. Lansing.

Subscribed and sworn to before me this 27th day of May, A. D. 1937.

S. G. Lippman,
Notary Public.

(Seal)

May 27, 158 And on to wit, the 27th day of May, 1937, came the National Builders Bank of Chicago and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

159 In the District Court of the United States.
(Caption—65890)

ANSWER OF NATIONAL BUILDERS BANK OF CHICAGO.

National Builders Bank of Chicago, a Federal Corporation, for answer to the petition of Avery Brundage Company, et al., in the above entitled cause, states as follows:

1. It acknowledges that it has on deposit in an account designated "Sales Tax Escrow Fund" the sum of $314885.95 as alleged in said petition, subject to withdrawal only on the following conditions; "Each cheque must bear the signature of either Benjamin F. J. Odell or Ruth V. Willner, and R. G. Harris, or P. M. Weaver together with E. M. Craig or R. D. Steele."

2. It reserves the right to object to such orders, if any, as

may be entered by the Court, which would direct the payment of this fund in any other manner than is provided in the directions under which it accepted such account.

3. It disclaims any interest in the other allegations in said petition and as to all allegations involving this bank, will require strict proof.

National Builders Bank of Chicago,
By (Signed) W. G. McLaury,
President.

Attest:
Louis A. Bowman,
Assistant Cashier.

160 And on, to wit, the 27th day of May, 1937, came E. M. Craig and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit: Filed May 27, 1937.

161 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—65890) * *

ANSWER OF E. M. CRAIG TO THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED MAY 24, 1937.

E. M. Craig, answering the petition of Avery Brundage Company, et al. filed herein May 24, 1937, says:

1. He admits the allegations of the petition.

2. In signing the letter to the National Builders Bank of Chicago dated May 2, 1935, this respondent was acting as the agent and representative of the petitioners and others who later deposited moneys in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, and he was also acting as the agent and representative of the Building Construction Employers' Association and the other Associations who were "subscribers" to the agreement of April 9, 1935, between said Associations and the Tax Service Association of Illinois; that he was not acting at any time as the agent or representative of and had no connection with the Tax Service Association of Illinois.

3. This respondent is ready, willing and eager to com-
162 ply with any request of the petitioners in regard to the disposition of the moneys deposited by them in said Sales

Tax Escrow Fund in the National Builders Bank of Chicago and to release or disburse said moneys in said fund in accordance with the desires of the petitioners.

E. M. Craig,
Respondent.

June 3, 37. 163 And on, to wit, the 3rd day of June, 1937, came William L. O'Connell, Receiver by his attorney and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

164 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ANSWER.

Now comes William L. O'Connell, Jr., as Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt, and for answer to the Petition of Avery Brundage, et al., says:

1. This respondent, upon information and belief, admits the allegations of Paragraph 1 of said Petition.

2. This respondent, upon information and belief, admits the allegations of Paragraph 2 of said Petition.

3. This respondent, although neither the original nor a copy of said contract has come into his possession, admits, upon information and belief, that the agreement as set forth in words and figures in Paragraph 3 of said Petition, was executed by the parties thereto.

4. This respondent, upon information and belief, ad-
165 mits the allegations of Paragraph 4 of said Petition.

5. This respondent, upon information and belief, admits that Benjamin F. J. Odell received part of said sum of One Thousand Five Hundred and no/100ths Dollars ($1,500.00), but this respondent has no knowledge sufficient to form a belief, as to whether or not said Benjamin F. J. Odell had an agreement to receive part of the further amount to be paid to the Tax Service Association of Illinois, under the terms of said agreement of April 9, 1935, and therefor neither admits nor denies the same.

6. This respondent, upon information and belief, admits the allegations of Paragraph 6 of said Petition.

7. This respondent has no knowledge sufficient to form a

belief as to whether the said Tax Service Association of Illinois, a corporation, filed some of the originals of said returns with the Illinois Department of Finance, but did not file some of said returns, and therefore neither admits nor denies the same.

This respondent denies that there are now in the possession or control of this respondent, as Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt, or otherwise, the originals of petitioners' returns which it is alleged, were not filed with the Illinois Department of Finance, and the copies of all of said returns, and this respondent further denies that he has in his possession or control, as such Receiver, or otherwise, any of the originals or copies of said returns of petitioners, and which are alleged to have been transmitted to the Tax Service Association of Illinois; this respondent, upon information and belief, admits that the 166 checks accompanying said returns were deposited in a certain account in the National Builders Bank of Chicago, known as the "Sales Tax Escrow Fund."

8. This respondent, upon information and belief, admits the allegations of Paragraph 8 of said Petition.

9. This respondent has no knowledge sufficient to form a belief, as to whether or not the petitioners consented to the establishments of said so-called Sales Tax Escrow Fund, and sent their checks to be deposited in said account, for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois, the respective taxes shown to be due on their respective returns hereinabove described, if the Illinois Department of Finance, and the Courts decided that the petitioners were not exempt from said tax, and therefor neither admits nor denies the same, and this respondent has no knowledge sufficient to form a belief, as to whether or not the petitioners consented to the establishment of said account, and sent their checks to be deposited in said account, pursuant to the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell, and therefor neither admits nor denies the same; this respondent denies that neither the Tax Service Association of Illinois, or William L. Connell, Jr., Receiver of said Tax Service Association of Illinois, have no right or interest in said monies on deposit in said Sales Tax Escrow Fund, and denies that said Odell, Harris and Craig, have the duty to disburse that part of the fund alleged to have been deposited by the petitioners

in accordance with the directions and request of peti-
167 tioners.

This respondent, further answering Paragraph 9 of said Petition, upon information and belief says that divers members of the associations, who are parties to said agreement of April 9, 1935, forwarded to the Tax Service Association of Illinois, their checks payable to the National Builders Bank of Chicago; that said checks so received by said Tax Service Association of Illinois were deposited in said Escrow Fund, not only for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois the respective taxes shown to be due on the respective returns which accompanied said checks, if the Illinois Department of Finance and the Courts decided that the petitioners were not exempt from said tax, but also for the purpose of assuring the payment to Tax Service Association of Illinois of such amount as may be due it under the terms of said agreement of April 9, 1935, in the event of a favorable decision, either by the Department of Finance of the State of Illinois, the lower Court, or the Supreme Court of the State of Illinois, and that by reason of the filing of the petition herein by petitioners, that portion of said fund now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, which was furnished by petitioners, is subject to the jurisdiction and order of this Court.

10. This respondent, upon information and belief, admits there was deposited in said Sales Tax Escrow Fund, and that there is now in said fund in the National Builders Bank of Chicago, the sum of Three Hundred Fourteen Thousand, Eight Hundred Eighty-Five and 95/100ths Dollars ($314,-168 885.95); this respondent has not sufficient knowledge to form a belief as to how much of this amount was deposited in said fund, on behalf of, or by petitioners, or whether there is now in said fund, belonging to said petitioners, Two Hundred Ninety-Seven Thousand, Five Hundred Thirty-Four and 79/100ths Dollars ($297,534.79), or slightly in excess thereof, or any other sum, and therefore neither admits nor denies the same; this respondent has not sufficient knowledge to form a belief as to whether or not the exact amount deposited from time to time in said fund is shown on the books and records of the Tax Service Association of Illinois, as a part of the service it was supposed to render under said agreement of April 9, 1935, as no such records have come into the possession of this respondent, and therefor, this respondent neither admits nor denies the same.

11. This respondent, upon information and belief, admits the allegations of Paragraph 11 of said Petition, and further answering said Paragraph 11, this respondent says, that while the Supreme Court of the State of Illinois, in its opinion in the case entitled, "R. S. Blome Co., et al., Appellants, *vs.* K. L. Ames, Director of Finance, et al., Appellees," reported in 365 Illinois Supreme Court Reports, 456, decided inter alia, "that building contractors furnishing supplies, are subject to the Retailers Occupation Tax Act," said Court in said opinion, also decided that said tax can not be computed on both labor and materials in building, but that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, and reversed the decree of the trial Court, and remanded the cause for further proceedings
169 not inconsistent with said opinion; that said opinion, in so far as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners, and all other members of said contractors' associations, and effected substantial tax savings; and that said petitioners, and the other members of said contractors' associations, thereupon, under the terms and provisions of said agreement entered into under date of April 9, 1935, with the Tax Service Association of Illinois, became liable to pay to the said Tax Service Association of Illinois, the calculated net savings on said tax for the three calendar months next preceding such saving, total charges not to exceed the sum of Twenty Thousand and no/100ths Dollars ($20,000.00).

12. This respondent has no knowledge sufficient to form a belief, as to the allegations or conclusions of Paragraph 12 of said Petition, and therefor neither admits nor denies the same.

13. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 13 of said Petition, and therefor neither admits nor denies the same.

14. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 14 of said Petition, and therefor neither admits nor denies the same.

15. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 15 of said Petition, and therefor neither admits nor denies the same.

16. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 16 of said Peti-
170 tion, and therefor neither admits nor denies the same.

17. This respondent admits the allegations of Para-

graph 17 of said Petition, and further answering said Paragraph 17, this respondent says that he caused a demand to be made upon the said Harris, as President, and upon one George P. Clayson, as Secretary, and one Mildred P. Voight, as Assistant Secretary, of said Alleged Bankrupt, by Registered Mail, Return Receipt Requested, and that as appears from the returns in the possession of this respondent, said Harris and Voight, refused to accept said demand.

18. This respondent denies the said tax returns, as in Paragraph 18 of said Petition set forth, are the property of said petitioners, and further denies that this respondent, as Receiver aforesaid, has no interest in said returns, or the right to the possession thereof, and further denies that said petitioners are entitled to the delivery instanter, or otherwise, or said tax returns, or any part thereof.

This respondent, further answering Paragraph 18 of said Petition, admits that he, as such Receiver, is entitled to the immediate possession of all such books and records as in said Paragraph 18 set forth.

19. This respondent denies that the sum of Two Hundred Ninety-Seven Thousand, Five Hundred Thirty-Four and 79/100ths Dollars ($297,534.79), alleged to have been deposited in the said Sales Tax Escrow Fund by petitioners, is the sole property of petitioners, but this respondent says that said Tax Service Association of Illinois, has a claim to, and an 171 interest in said monies now on deposit in the said Sales Tax Escrow Fund, in an amount not to exceed the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) under and by virtue of said agreement of April 9, 1935.

20. This respondent has no knowledge sufficient to form a belief, as to the allegations or conclusions of Paragraph 20 of said Petition, and therefor neither admits nor denies the same.

This respondent denies that said petitioners are entitled to the relief prayed for in Paragraphs 2 and 3 of the prayer of said Petition.

This respondent, further answering, says that under and by virtue of said agreement of April 9, 1935, and the decision of the Supreme Court of the State of Illinois hereinabove referred to, a sum not to exceed Twenty Thousand and no/100ths Dollars ($20,000.00) of said monies on deposit with said National Builders-Bank of Chicago, in said Sales Tax Escrow Fund, is due and belongs to, the Tax Service Association of Illinois.

Wherefore, this respondent prays that an order may be entered herein, restraining and enjoining the petitioners, and each of them, their attorneys and agents, the National Builders Bank of Chicago, its employees, agents, and attorneys, Benjamin F. J. Odell, R. G. Harris, Ruth V. Wilner, P. M. Weaver, E. M. Craig, and R. D. Steele, or any of them, from paying out, disbursing, or otherwise disposing of the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) of said monies now on deposit with the National Builders Bank of
172 Chicago, in said Sales Tax Escrow Fund, until an adjudication of the Alleged Bankrupt is had in this proceedings, or until the further order of this Court.

William L. O'Connell, Jr.,
As Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt.

State of Illinois, } ss.
County of Cook. }

William L. O'Connell, Jr., being first duly sworn, deposes and says that he has read the foregoing Answer by him subscribed, knows the contents thereof, and that the same is true, except as to those matters therein averred to be upon information and belief, and as to such matters, he verily believes them to be true, and except as to such matters which affiant therein avers he has no knowledge sufficient to form a belief, and as to such matters, this affiant has no knowledge sufficient to form a belief.

William L. O'Connell, Jr.

Subscribed and Sworn to before me this 29th day of May, A. D. 1937.

John H. Clausen,
(Seal) *Notary Public.*

70 And on, to wit, the 3rd day of June, 1937, came Benjamin F. Odell and filed in the Clerk's office of said Court a certain Special Answer in words and figures following, to wit:

Filed June 8, 1937. 71 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—65890) * *

SPECIAL ANSWER OF BENJAMIN F. J. ODELL TO THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED HEREIN MAY 24TH, 1937.

Now comes Benjamin F. J. Odell, appearing in his own behalf, specially and not generally, reserving any and all objections to the jurisdiction of this court over his person and the subject matter of said petition, but answering the petition on the order of this court, says:

That the petition of the said Avery Brundage Company, et al., was filed herein pending the determination of jurisdiction in the bankruptcy proceeding of the Tax Service Association of Illinois, a corporation; and that the question of this court's bankruptcy jurisdiction over the Tax Service Association of Illinois, a corporation, is now pending undetermined; that while the jurisdictional question is now before this court, the court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

72 Wherefore your respondent prays that the petition heretofore filed on the 24th day of May, A. D. 1937, by Avery Brundage Company, et al., be stricken forthwith.

Benjamin F. J. Odell,
Attorney Pro Se.

State of Illinois, } ss.
County of Cook. }

Benjamin F. J. Odell, being first duly sworn, on oath deposes and says that he is the respondent herein answering in the above entitled cause, that he has read the answer by him subscribed and that the same is true in substance and in fact.

Benjamin F. J. Odell.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
Notary Public.

(Seal)

73 And on, to wit, the 3rd day of June, 1937, came Roy G. Harris by his attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed June 1937.

74 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION OF ROY G. HARRIS TO STRIKE THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED ON THE 24TH DAY OF MAY, A. D. 1937.

A petitioner, Roy G. Harris, by Luis Kutner, his attorney, responding specially for the sole purpose of this motion and petition, questions the jurisdiction of this court over his person, and for no other purpose, and moves the court to strike a petition of Avery Brundage Company, et al., upon the grounds and for the reasons following, to wit:

That the petition of the said Avery Brundage Company, et al., was filed herein pending the determination of jurisdiction in the bankruptcy proceeding of the Tax Service Association of Illinois, a corporation; and that the question of this courts bankruptcy jurisdiction over the Tax Service Association of Illinois, a corporation, is now pending undetermined; that while the jurisdictional question is now before this court, the court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

75 Wherefore your petitioner prays that the petition heretofore filed on the 24th day of May, A. D. 1937, by Avery Brundage Company, et al., be stricken forthwith.

Roy G. Harris,
By Luis Kutner,
Luis Kutner,
His attorney, appearing specially.

State of Illinois, } ss.
County of Cook. }

Luis Kutner, being first duly sworn, on oath deposes and says that he is a citizen and resident of the City of Chicago, State of Illinois; that he is duly authorized to make the affi-

davit, and is the agent of said Roy G. Harris, and that he has read the foregoing petition and the same is true in substance and in fact.

Luis Kutner.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
Notary Public.

(Seal)

June 3. 76 And on, to wit, the 3rd day of June, 1937, came the Alleged Bankrupt by his attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

77 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT, TO STRIKE THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL, FILED ON THE 24TH DAY OF MAY, A. D. 1937.

Now comes the alleged bankrupt, Tax Service Association of Illinois, a corporation not for profit, organized and existing under and by virtue of the laws of the State of Illinois, by Luis Kutner, its attorney, responding specially for the sole purpose of this petition to question the jurisdiction of this court over its person and for no other purpose, and to further question the jurisdiction of this court over the subject matter set forth in the petition of Avery Brundage Company, et al, heretofore filed upon the grounds and for the reasons following, to wit:

1. The said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit.

2. That on the 18th day of May, A. D. 1937, the said Tax Service Association of Illinois, did file a motion to quash service of process herein and in substance questioned
78 the jurisdiction of this court over its person and which motion is now pending undisposed of by this court.

3. That the petition of the said Avery Brundage Company, et al, was filed herein while the bankruptcy proceeding is now

pending, which is an attempt to adjudicate the Tax Service Association of Illinois, a Corporation, a Bankrupt; and that the question of this court; bankruptcy jurisdiction over the Tax Service Association of Illinois, a Corporation, is now pending undetermined; that while the jurisdictional question is now before this court, this court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

Wherefore your petitioner prays that the petition of Avery Brundage Company, et al, heretofore filed, be stricken.

Tax Service Association of Illinois
By Luis Kutner,
Luis Kutner, its attorney, appearing specially.

State of Illinois }
County of Cook } ss.

Luis Kutner, being first duly sworn, on oath deposes and says that he is a citizen and resident of the City of Chicago, State of Illinois; that he is duly authorized to make the affidavit, and is the agent of said alleged bankrupt, and that he has read the foregoing petition and the same is true in substance and in fact.

Luis Kutner.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
(Seal) *Notary Public.*

173 And on, to wit, the 23rd day of June, 1937, came Referee William L. Sullivan and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

June 28, 174 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, IN THE INVOLUNTARY PETITION AND VARIOUS MOTIONS HEREIN.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, For the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On May 3, 1937, four creditors filed an involuntary petition in bankruptcy against Tax Service Association of Illinois, a corporation. On May 18, 1937, the alleged bankrupt corporation filed herein what it denominated as a "Motion to quash the alleged service of process and return thereon and to vacate all orders heretofore entered," supported by its affidavit signed by its president, which motion and accompanying papers I shall hereafter sometimes refer to as the alleged bankrupt's "motion to quash."

As to the latter motion to quash of the alleged bankrupt corporation, the involuntary petitioning creditors, on May 26, 1937, filed what they denominated as a motion "to strike the special appearance and dismiss alleged bankrupt's motion."

June 2, 1937 the involuntary petitioning creditors filed 175 herein a "supplement" to their motion to strike the special appearance and to dismiss alleged bankrupt's motion. To the latter so-called supplement to motion of the involuntary petitioning creditors, an answer was filed on June 7, 1937 by the alleged bankrupt corporation, praying that it (the supplement to motion of petitioning creditors) be stricken from the files.

The alleged bankrupt's motion to quash, the involuntary petitioners' motion to strike the special appearance and dismiss alleged bankrupt's motion, the petitioning creditors' "supplement" to their motion to strike and to dismiss, and the alleged bankrupt's answer thereto were referred to me.

On June 9, 1937, after due notice to all parties in interest, a hearing was held before me on the above references, which hearing was attended by the attorneys for the involuntary petitioning creditors, by the attorney for the alleged bankrupt corporation, and others. After such hearing I took the mat-

ters presented under advisement, and the petitioning creditors and the alleged bankrupt corporation have filed briefs with me, which are respectfully transmitted herewith.

The various papers, pleadings or documents filed by the parties and referred to me are of considerable length—and for that reason I will not discuss their contents herein in great detail—yet a brief statement of their subject matter is necessary to an understanding of the legal questions involved.

176 The involuntary proceedings herein in bankruptcy were commenced by creditors in statutory number and amount. The involuntary petition in bankruptcy averred, briefly, that the alleged bankrupt corporation is a corporation which may be adjudicated an involuntary bankrupt within the purview of the National Bankruptcy Act, that it is insolvent, and that it committed sundry acts of bankruptcy, enumerating them. Thereafter, the alleged bankrupt corporation filed its so-called motion to quash. Such motion sets forth that, "Now comes the alleged bankrupt, * * * appearing specially for the sole purpose of this motion only, to question the jurisdiction of this court over its person and for no other purpose, and moves the court to quash the pretended service of notice and process upon it in this cause and the return thereon, and to vacate all orders heretofore entered, upon the grounds and for the reasons following * * *."

One of the grounds and reasons set forth is that "no process in this cause has ever been served upon or delivered to said alleged bankrupt personally or to any of its duly authorized agents empowered to accept process or notice, notwithstanding the return made herein by William H. McDonnell, United States Marshal * * *." The said motion to quash then goes on to state that the service (which according to the return of the marshal was had upon the alleged bankrupt corporation by delivering a copy thereof to Ralph A. Simmons, secretary and agent of said corporation) was void because said Simmons, at the time of the service, was not associated with the alleged bankrupt corporation in any capacity whatsoever, said Simmons having resigned some months previously.

177 In said motion to quash, however, the alleged bankrupt did not limit itself to the claimed void service of process upon it, but it also set forth, among other things, that it is not a monied or business corporation within the scope of the National Bankruptcy Act, and that it is not insolvent, and that it has never committed any acts of bankruptcy. In sup-

port of such motion to quash there was presented by the alleged bankrupt its affidavit by its president and certain photostatic copies of minutes of the acceptance by the alleged bankrupt corporation of the resignation of Simmons, and the tender of such resignation.

The affidavit of the president of the alleged bankrupt corporation is along the same general lines as its motion to quash, though in somewhat more detail, and such affidavit, besides stating that the service was void and the reasons therefor, also states, among other things, that the involuntary petition was not filed in good faith, that the alleged bankrupt corporation did not commit any acts of bankruptcy nor is it insolvent within the purview of the bankruptcy statute.

Further, the motion to quash asked that the court vacate all orders "heretofore entered." The court had theretofore, on May 5, 1937, or almost two weeks before the motion to quash was filed, appointed a receiver in bankruptcy of the alleged bankrupt's property.

178 On May 26, 1937, the petitioning creditors filed a motion to strike the special appearance of the alleged bankrupt corporation and to dismiss the alleged bankrupt's motion on the grounds that the alleged bankrupt corporation, in its motion to quash and affidavit in support thereof, had pleaded to the merits of the involuntary petition in bankruptcy.

As above stated, there were also referred to me the supplement to the motion of the petitioning creditors to strike the special appearance and dismiss the alleged bankrupt's motion, as well as the alleged bankrupt's answer thereto. It is contended by the petitioning creditors in such supplement to its motion that the action of the alleged bankrupt in consenting to the order entered in the case relative to the petition filed by Avery Brundage Company, et al, concerning certain sales tax funds in escrow, and the agreement to the entry of such order by the alleged bankrupt, had the effect of admitting that the alleged bankrupt further submitted itself to the jurisdiction of the court and further waived all questions of jurisdiction.

The supplement to the motion of the petitioning creditors averred that, on May 27, 1937, a certain order was entered by the court relative to a sales tax escrow fund, more particularly set forth in the petition filed herein by Avery

179 Brundage Company, et al; that the said order entered herein on May 27, 1937 bears the signature of the alleged bankrupt by its attorneys and duly authorized agent, as well

as the signature of Roy G. Harris, its president; that said order contains, among other things, the following finding:

"This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al, by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:

* * *"

180 Such supplement to motion of the petitioning creditors further avers that in and by the entry of the aforesaid order and agreement thereto by the said alleged bankrupt, such alleged bankrupt has further submitted itself generally to the jurisdiction of this court, and therein and thereby has further served to waive any and all questions or matters of jurisdiction.

On June 7, 1937, the alleged bankrupt filed an answer to the supplement to motion of the petitioning creditors. In its answer it denies that the entry of the order of May 27, 1937, relating to the petition filed by Avery Brundage Company, et al, constitutes a submission generally to the court's jurisdiction; denies that the entry of said order served to waive any and all questions or matters of jurisdiction; avers that the consent to the said order was obtained at the instance and suggestion of this court after the alleged bankrupt advised the court that the question of jurisdiction relating to the petition in bankruptcy was pending undetermined; avers that there was a clear understanding with the court that the entry of said order of May 27, 1937, was without prejudice to the question of jurisdiction relating to the petition in bankruptcy, and that petitioning creditors were present in court at that time by their attorneys; avers that the supplement to the motion of the petitioning crediors to strike is not made in good faith and is in direct violation of the understanding had in court; avers that the order of May 27, 1937 states, among other things, as follows:

181 "• • • and said petitioners and said respondents having in open court agreed that the court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, • • •"

Attorney Sigmund W. David of the law firm of David & Fainman, which law firm had filed the so-called Avery Brundage Company, et al, petition, stated at the hearing before me that, in fairness to the attorney for the alleged bankrupt corporation, he thought he should state that it was the understanding between Attorney Flaherty (attorney for the receiver), the attorney for the alleged bankrupt corporation and himself that the so-called Avery Brundage Company, et al, order was entered subject to the then pending motions of the alleged bankrupt corporation to quash the service. He further stated that the original draft order which he drew said something about it, but it was thought unnecessary, as it was felt that the order in relation to the so-called Avery Brundage Company, et al., petition would not affect the then pending motion of the alleged bankrupt corporation on the question of service and jurisdiction.

Having in mind Your Honor's references to me herein, the alleged bankrupt corporation and the involuntary petitioning creditors seem to have somewhat lost sight of the questions presented on the references to me as special master.

182 Briefly, the questions are, whether the special appearance of the alleged bankrupt corporation should be stricken and whether the alleged bankrupt corporation's motion, to quash the alleged service of process and return thereon and to vacate all orders heretofore entered herein, had the effect of waiving any irregularity in the service of process and of conferring upon the court jurisdiction to hear the cause on its merits.

The alleged bankrupt corporation in its brief states that the "sole, exclusive and only question in this case at this time is one of law,—whether a non-profit corporation may be involuntarily adjudicated a bankrupt." It "moves" in its brief that the involuntary petition be dismissed at petitioning creditors' costs. The involuntary petitioning creditors in their brief ask that an order of adjudication be entered against the alleged bankrupt corporation. Obviously, this cause has not yet reached the stage, where either the motion of the alleged bankrupt corporation for dismissal of the involuntary peti-

tion or the request of the petitioning creditors for adjudication of the alleged bankrupt corporation is opportune.

The legal questions involved on Your Honor's references to me are not difficult of solution, notwithstanding the maze of technicalities in which they seem to be enmeshed by the various and lengthy motions. And in deciding such legal questions I do not think it necessary to consider at all
183 the alleged bankrupt corporation's consent to the already referred to Avery Brundage, et al, order.

The law seems to be clear that the court obtained prima facie jurisdiction of this proceeding as soon as the involuntary petition was filed. Upon the face of the petition the alleged bankrupt corporation appeared to be a corporation subject to involuntary bankruptcy. The involuntary petition alleged "that the said alleged bankrupt is engaged in the business of rendering services in connection with the levy and collection of taxes both real and personal, and is not a railroad, municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act, * * *." In such situation the court had a right to preserve the property and as a means to that end to appoint a receiver. *In re De Lancey Stables Co.*, 170 Fed. 860; *In re Illinois Fireworks*, 4 Fed. Supp. 200.

If this were a case where, upon the face of the involuntary petition, it was clear that the alleged bankrupt corporation was such a corporation as could not under the law be adjudicated a bankrupt, obviously any action attempted by the court would be wholly void for no jurisdiction ever attached—the petition is coram non judice. But where, as here, there is an apparent right to file the petition, jurisdiction undoubtedly exists, that is, the right to hear, inquire and determine—although the inquiry may result in a finding that the aver-
184 ments of the petition are not true, and that for this reason the proceeding can go no further. *In re De Lancey Stables, supra.*

Another step took place in the proceedings when a couple of weeks after the involuntary petition was filed, along came the alleged bankrupt corporation and filed its special appearance and "motion to quash the alleged service of process and return thereon and to vacate all orders heretofore entered" supported by its lengthy affidavit signed by its president. In addition to such motion of the alleged bankrupt corporation alleging that the service had upon such corporation was void,

such motion also traversed the material allegations of the involuntary petition by averring that the alleged bankrupt corporation was not such a corporation as could be adjudicated an involuntary bankrupt, that the alleged bankrupt corporation is not insolvent and that it has never committed any acts of bankruptcy.

Did the alleged bankrupt's motion to quash the service of process and return thereon and to vacate all orders theretofore entered, notwithstanding it recited that the alleged bankrupt was "appearing specially for the sole purpose of this motion only, to question the jurisdiction of this court over its person and for no other purpose," have the effect of waiving the irregularity of the service and of conferring jurisdiction upon the court to inquire into the merits of the cause?

185 The rule is that the motion to quash the writ or service should go no farther than raise the special objection to the form of the writ or the irregularity of the service, because any affirmative matter raising an issue on the merits would waive the irregularity of service. (Simkin's Federal Practice, Revised Edition, page 600.) In 4 Corpus Juris, 1233, it is said that, "Broadly stated, any action on the part of a defendant except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance."

See, also, *Jones* v. *Andrews;* 10 Wall 327 (19 L. Ed. 935); *Clark* v. *Claflin,* 218 Fed. 429; *American Gasoline Corp.* v. *Commerce Trust Co.,* 29 Fed. (2d) 46; *Massachusetts Bonding & Insurance Co.* v. *Concrete Steel Bridge Co.,* 37 Fed. (2d) 695; *Feldman* v. *Connecticut General Life Insurance Co.,* 78 Fed. (2d) 838; *Edgell* v. *Felder,* 84 Fed. 69; *Sheppard* v. *Lincoln,* 184 Fed. 182; *Sanderson* v. *Bishop,* 171 Fed. 769; Nichols on Federal Procedure, Vol. 3, Section 763, at pages 426, 428, 431 (see also Section 76); *In re Cant,* 52 Fed. (2d) 223; *In re Smith,* 117 Fed. 96.

Under the situation found here, it is my opinion that the written motion to quash and the supporting affidavit of the alleged bankrupt corporation, because they contain matters of defense on the merits to the allegations of the involuntary petition, must be regarded as waiving by the alleged bankrupt corporation of the irregularity or the invalidity of

186 the service upon it and of conferring upon the court jurisdiction to hear this cause on its merits—that is, jurisdiction to hear the matters alleged on one side by the involuntary petitioners and denied on the other side by the alleged bank-

rupt corporation. Such matters are whether the alleged bankrupt corporation is a corporation which may be adjudicated a bankrupt, whether such corporation is insolvent, whether it committed acts of bankruptcy, and whether it should be adjudicated a bankrupt.

The alleged bankrupt corporation in its brief appears to recognize that the general rule is as above shown but contends it does not apply to bankruptcy proceedings. The rule has been held to apply in involuntary bankruptcy cases, some of which are above cited by me.

The alleged bankrupt corporation, having waived the irregularity of the service upon it, because of the averments to the merits contained in its so-called motion to quash and supporting affidavit, the present status of the matter is that the involuntary petition in bankruptcy is now before Your Honor on the merits; and that portion of the alleged bankrupt's motion to quash averring defenses to the allegations of the involuntary petition—that is, that the alleged bankrupt
187 corporation is not a corporation that may be adjudged a bankrupt, that the alleged bankrupt corporation is not insolvent and has never committed an act of bankruptcy—should be treated, in my opinion, as an answer to the involuntary petition. And, in my opinion, the cause should now be preceded with on the merits of the involuntary petition and the answer of the alleged bankruptcy corporation. If the alleged bankrupt corporation should wish to file an amended answer, that is, of course, a matter upon which Your Honor would have to rule.

It might be well at this point to discuss briefly some of the contentions made in the briefs filed by the alleged bankrupt corporation and the involuntary petitioning creditors.

A large portion of the brief of the alleged bankrupt corporation is taken up with assertion of the propositions that the alleged bankrupt corporation can not be adjudicated a bankrupt because it is a non-profit corporation and that "no act of anybody can confer jurisdiction where the corporation by its charter conclusively classifies it in the exempt class."

It is true that the bankrupt in its motion to quash averred that it "is a corporation organized not for profit and not a moneyed or business corporation within the scope of the bankruptcy act." On the other hand, it must be remembered that the involuntary petition in bankruptcy alleged "that the said alleged bankrupt is engaged in the business of ren-
188 dering services in connection with the levy and collection of taxes both real and personal, and is not a railroad,

municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act * * * "

At the hearing before me the attorney for the alleged bankrupt corporation exhibited a certified copy of its charter and a certified copy of a certain bill of complaint which had been filed by one of the involuntary petitioning creditors herein against the alleged bankrupt corporation in the Superior Court of Cook County, alleging that the alleged bankrupt was a "not for profit" corporation and asking, among other things, for a receiver. Some very inconclusive discussion was also had before me but no testimony was offered.

The bankruptcy act does not prohibit a "not for profit" corporation from being adjudicated an involuntary bankrupt. What it provides is that "any moneyed, business or commercial corporation (except a municipal, railroad, insurance or banking corporation, or a building and loan association) * * * may be adjudged an involuntary bankrupt." In *Schuster* v. *Ohio Farmers' Cooperative Milk Ass'n*, (C. C. A. 6th Cir.) 61 Fed. (2d) 337, a corporation, which was a non-profit corporation by state law, was held to be subject to involuntary bankruptcy. The rule to be followed in determining whether
189 a corporation is subject to involuntary bankruptcy is that the charter and the laws of the state are to be looked to for the classification of the corporation; but where the corporation has failed to use the powers given it by its charter, or develops into a different type of corporation, then its charter will no longer be conclusive. Gilbert's Collier on Bankruptcy, 4th Edition, paragraph 215; *Matter of Prudence* (C. C. A., 2nd Cir.), 79 Fed. (2d) 77, cert. denied 296 U. S. 646.

In the case of *In re Glick*, 26 Fed. (2d) 397, our Circuit Court of Appeals held that whether the debtor is exempt from being declared an involuntary bankrupt is a question of fact to be determined in each case on its own facts and on all of the facts.

The alleged bankrupt corporation further states in its brief that, "By the very contents of the pleadings filed herein, this court must construe that the motion to quash raises questions properly raised by a motion to dismiss." That would be a strange procedure indeed, and its results could hardly be imagined in the orderly administration of the National Bankruptcy Act.

It must not be forgotten that what the bankrupt filed in

this cause was a so-called special appearance "to question the jurisdiction of this court over its person and for no other purpose," and a motion "to quash the pretended service of notice and process upon it in this cause and the return
190 thereon, and to vacate all orders heretofore entered."

The basis of its special appearance and motion to quash was that the service upon it was invalid.

There has been no "motion to dismiss" filed in this case based upon the fact that the alleged bankrupt corporation is not such a corporation as it subject to be adjudicated an involuntary bankrupt. Moreover, motions to dismiss reach only defects on the face of an involuntary petition. Obviously, there is no such defect here because the involuntary petition avers that the alleged bankrupt corporation is a corporation which may be adjudicated a bankrupt within the purview of the bankruptcy act. If the alleged bankrupt corporation claims that it is not such a corporation, that defense, in my opinion, is to be taken advantage of by answer and can not, as here, be taken advantage of by a motion to quash the service.

In Remington on Bankruptcy, Vol. 1, 4th (1934) Edition, paragraph 368, the rule is stated as follows:

"Upon a motion to dismiss controverted facts must be resolved in petitioner's favor. And a motion to dismiss raises only defects appearing on the face of the petition; and if it is desired to controvert facts alleged in the petition, an answer must be filed."

In the very latest case that I can find on the subject (*Blue Valley Creamery Company* v. *Stone*, 80 Fed. (2d) 483),
191 the Circuit Court of Appeals for the Third Circuit held unequivocally that, upon a motion to dismiss an involuntary petition in bankruptcy, only such defects as appear upon the fact of the petition may be considered by the court, and that other issues must be raised by answer to the petition.

I do not deem it necessary to discuss other contentions made by the alleged bankrupt corporation but it may be proper to advert to one of the contentions made by the involuntary petitioners. As I understand it, it is the view of the involuntary petitioners that, in the present state of the record, the alleged bankrupt corporation has waived its right to further question the fact that it is such a corporation as could be adjudged an involuntary bankrupt under the National Bankruptcy Act. That might be so if the question of jurisdiction to have it declared a bankrupt was a matter of privilege to the alleged

bankrupt. But that is not so. Unless it falls within the character of corporations that may be adjudged involuntary bankrupts, the alleged bankrupt corporation here could not be adjudged an involuntary bankrupt, even with its consent, not alone by any other act of it in these proceedings. (*Woolsey v. Security Trust Company*, 74 Fed. (2d) 334.) And the question of whether it is exempt from bankruptcy is one which must be determined upon a full hearing of all the facts. *In re Glick, supra.*

I find that the bankrupt's motion to quash the service of process and return contained averments going to the merits of the involuntary petition in that said motion to quash averred that the alleged bankrupt corporation was not one which could be adjudicated a bankrupt, that the alleged
192 bankrupt corporation was not insolvent, and that the alleged bankrupt corporation had not committed any acts of bankruptcy.

I further find that by reason of such averments in the alleged bankrupt's motion to quash, notwithstanding it stated that the bankrupt was appearing specially, the motion to quash had the legal effect of the alleged bankrupt corporation, on its part, waiving any irregularity or invalidity in the service and of conferring upon the court jurisdiction to hear the allegations of the involuntary petition and the denials thereof of the alleged bankrupt corporation on the merits.

I, therefore, respectfully recommend that the court enter an order:

1. Striking the special appearance of the alleged bankrupt corporation;

2. Denying the alleged bankrupt's motion to quash;

3. Finding and decreeing that the alleged bankrupt has waived the question of the irregularity or invalidity of the service upon it and has conferred jurisdiction upon the court to hear the cause on the merits.

4. Ordering that the averments contained in the alleged bankrupt corporation's motion to quash and supporting affidavit, going to the merits of the involuntary petition, stand as an answer to the involuntary petition.

I am transmitting herewith the following papers:

Involuntary petition filed May 3, 1937.

Motion to quash filed by alleged bankrupt on May 18 1937.

193 Petition of Avery Brundage Company et al., filed May 24, 1937.

Answer of petitioning creditors filed May 26, 1937, to petition of Avery Brundage Company, et al.

Motion of petitioning creditors filed May 26, 1937 to strike special appearance and dismiss alleged bankrupt's motion.

Answer of E. M. Craig to petition of Avery Brundage Company, et al.

Answer of National Builders Bank of Chicago to petition of Avery Brundage Company, et al.

Supplement filed June 2, 1937 to motion of petitioning creditors to strike special appearance and dismiss alleged bankrupt's motion.

Petition of alleged bankrupt to strike petition of Avery Brundage Company, et al.

Special answer of Benjamin F. J. Odell to petition of Avery Brundage Company, et al.

Answer of William L. O'Donnell, Jr., as receiver of alleged bankrupt, to petition of Avery Brundage Company, et al.

Petition of Roy G. Harris to strike petition of Avery Brundage Company, et al.

Answer of alleged bankrupt to supplement to motion of petitioning creditors to strike special appearance and dismiss alleged bankrupt's motion.

Alleged bankrupt's Exhibits Nos. 1 and 2.

Briefs submitted on behalf of petitioning creditors.

Brief submitted on behalf of alleged bankrupt.

Respectfully submitted,
Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, June 22, 1937.

79 And on, to wit, the 29th day of June, 1937, came the Dahl-Stedman Co. et al., by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed J 1937.

80 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

PETITION OF DAHL-STEDMAN CO., ET AL.

1. Your petitioners, Dahl-Stedman Co., et al., are all of the two hundred seventy-eight (278) contractors who filed their petition herein on May 24, 1937, under the name of

Avery Brundage Company, et al., except Avery Brundage Company, which contractor is not represented by Sigmund W. David and is not a petitioner herein, and was included in the original petition filed May 24, 1937, by inadvertence.

2. By agreement and consent of the petitioners, the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago, and of the petitioning creditors herein, this Court entered upon the petition of petitioners filed May 24, 1937, its order dated May 27, 1937, and pursuant to said order Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) was paid out of the Sales Tax Escrow Fund in
81 the National Builders Bank of Chicago to the Department of Finance of the State of Illinois to apply on account of principal and interest for Illinois Retailers' Occupational Taxes owing by the petitioners and the other contractors having moneys in said Sales Tax Escrow Fund.

3. Since th order of May 27, 1937, was entered, the amount in said Sales Tax Escrow Fund has been checked and the amount that each contractor had in said Sales Tax Escrow Fund has been checked and verified. On May 27, 1937, there was, in fact, on deposit in said Sales Tax Escrow Fund Three Hundred Fourteen Thousand Nine Hundred Fifty-eight Dollars and Seventy-five Cents ($314,958.75), about Seventy-five Dollars ($75) more than the amount alleged in petition of petitioners. Of said total amount in said Sales Tax Escrow Fund Two Hundred Ninety-seven Thousand Twenty-three Dollars and Five Cents ($297,023.05) was deposited therein by your two hundred seventy-seven (277) petitioners and Seventeen Thousand Eight Hundred Fifty-Nine Dollars and Five Cents ($17,859.05) thereof was deposited therein by the contractors represented by the respondent, Benjamin F. J. Odell. This leaves a balance of about Seventy-five Dollars ($75) in said Sale Tax Escrow Fund not presently accounted for. Of the Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) withdrawn from said Sales Tax Escrow Fund pursuant to the order of May 27, 1937, and paid to the Department of Finance of the State of Illinois Two Hundred Twenty-two Thousand Seven Hundred Sixty-seven Dollars and Twenty-eight Cents ($222,767.28) thereof represented payment by your petitioners on account of prin-

cipal of the taxes due by petitioners, and Five Thousand
82 Six Hundred Seventy-five Dollars and Thirty-seven Cents ($5,675.37) represented estimated interest on said principal. Therefore, of said Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) heretofore paid out of said Sales Tax Escrow Fund Two Hundred Twenty-eight Thousand Four Hundred Forty-two Dollars and Sixty-five Cents ($228,442.65) represented moneys paid by your petitioners and Thirteen Thousand Seven Hundred Fifty-seven Dollars and Thirty-five Cents ($13,757.35) represented moneys paid by the contractors represented by Benjamin F. J. Odell. There, therefore, now remains in said Sales Tax Escrow Fund Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to your two hundred seventy-seven (277) petitioners and Four Thousand One Hundred One Dollars and Seventy Cents ($4,101.70) is the money of and belongs to the contractors represented by Benjamin F. J. Odell. The small balance of approximately Seventy-five Dollars ($75) is still unaccounted for.

4. Pursuant to the order of this Court entered May 27, 1937, all of the respondents have filed answers to the petition of your petitioners filed May 24, 1937. Some of said respondents claim an interest in said Sales Tax Escrow Fund to the extent of Twenty Thousand Dollars ($20,000). None of said respondents claim any interest in the Sales Tax Escrow Fund or the balance remaining therein or the balance remaining therein belonging to your petitioners, in excess of
83 Twenty Thousand Dollars ($20,000). Of the Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) now in said Sales Tax Escrow Fund in the National Builders Bank of Chicago which is the money of and belongs to your petitioners, at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to your petitioners free from any claim or demand of any kind whatsoever of any of the respondents, and is the money of and belongs to your petitioners, free from all claims and demands. Your petitioners need said Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in their respective businesses, they are not being paid any interest on said sum, and they are being damaged by the retention of said sum in said Sales Tax Escrow Fund. Your petitioners are willing to leave in said

Sales Tax Escrow Fund, subject to the further order of this Court, Twenty Thousand Dollars ($20,000) of their money until it is finally determined by this Court whether any person, firm or corporation other than your petitioners have any interest in said Twenty Thousand Dollars ($20,000) or any claim thereto, or any part thereof.

5. Each of your petitioners has, by special written authorization, authorized George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as a Special Committee on Illinois Retailers' Occupational Tax, to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund.

84 Wherefore your petitioners pray:

1. That this Court enter order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and deliver said check instanter to said Special Committee or any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payee and presentation of said check for payment.

2. That the Court grant such further relief to your petitioners as may be necessary in the premises.

Dahl-Stedman Co. and the other individuals, partnerships and corporations who are petitioners herein,
By George V. Dahl,
Henry P. Reger and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax, authorized to act for and sign this petition on behalf of all of the petitioners.

Sigmund W. David,
Attorney for Petitioners.

85 State of Illinois, } ss.
County of Cook. }

George V. Dahl, being first duly sworn, on oath, deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as a Special Committee on Illinois Retailers' Occupation Tax and authorized to act on behalf of petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf and makes this affidavit on behalf of all of said petitioners. Affiant further says that he has read the above petition and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge and belief.

Further affiant sayeth not.

George V. Dahl.

Subscribed and sworn to before me this 25th day of June, 1937.

Nathan Chertkow,
(Seal) *Notary Public.*

86 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered Ju 29, 1937

87 In the District Court of the United States.

(Caption—65890)

ORDER.

This matter coming to to be heard upon the petition of petitioners, Dahl-Stedman Co., et al., filed this day, by Sigmund W. David, attorney for petitioners, and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago, the petitioning creditors in these proceedings, and certain other

parties represented by the law firm of Hopkins, Starr & Hopkins having received notice of the presentation of said petition, and all of said parties having appeared in Court and none of the respondents or other parties having made any objection to the entry of an order in accordance with the prayer of the Petition of Dahl-Stedman Co., et al., this day filed, except Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, who raised the question of the jurisdiction of the Court an order in accordance with the prayer of said petition this day filed; and

88 The Court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition; and Benjamin F. J. Odell requested that his special answer filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al. this day filed, and R. G. Harris requested that his petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al. this day filed, and the Tax Service Association of Illinois, alleged bankrupt, requested that its petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937, stands as its answer to the petition of Dahl-Stedman Co., et al. this day filed;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of Benjamin F. J. Odell to the petition of Dahl-Stedman Co., et al. this day filed; that the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of said R. G. Harris to the petition of Dahl-Stedman Co., et al. this day filed; and that the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the petition

89 of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of the Tax Service Association of Illinois, alleged bankrupt, to the petition of Dahl-Stedman Co., et al. this day filed.

2. That the petition of Dahl-Stedman Co., et al., this day filed, and the respective answers of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, above set forth, are hereby referred, upon the issues made by said petition and said answers thereto, to Referee William L. Sullivan to report to this Court within a short day his conclusions thereon.

Enter

Philip L. Sullivan,
Judge.

June 29, 1937.

90 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered J 29, 193

91 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

At Chicago, Illinois, this 29 day of June, A. D. 1937.

This cause coming on to be heard upon the alleged bankrupt's Motion to Quash, service of various process in this cause and further entry of other and further orders as prayed for in said Motion to Quash, and upon the petitioning creditors' Motion to Strike, the alleged bankrupt's special appearance and to dismiss the aforesaid Motion to Quash, and upon the report of the Special Master, William L. Sullivan, to whom the aforesaid motions were previously specially referred for consideration and recommendation, and the Court having examined the report of the said Special Master and having heard arguments of counsel and being fully advised in the premises, Finds:

That the said Special Master, William L. Sullivan, has in all respects proceeded in this matter according to law, and that his said report is well founded in every respect.

That the alleged bankrupt has waived the question of irregularity or invalidity of the service of any and all process or notice heretofore served upon it and has conferred juris-

diction upon the Court to hear the cause on the merits, and has appeared generally in this cause.

It Is Therefore Ordered that the report of the Special Master, William L. Sullivan, this day tendered to the Court, be and the same is hereby approved in every respect and ordered filed.

It Is Further Ordered that the special appearance of the alleged bankrupt corporation heretofore filed in the above entitled cause, be and the same is hereby ordered striken.

It Is Further Ordered that the alleged bankrupt's Motion to Quash the alleged services of process and return thereon, and to vacate all orders heretofore entered, as well as all other relief prayed for in the said Motion to Quash, be and the same is hereby denied, for in the said Motion to Quash, and supporting affidavit, be and the same are hereby ordered to stand as the answer of the said alleged bankrupt to the involuntary petition in bankruptcy heretofore filed in the above entitled matter.

It Is Further Ordered that the said alleged bankrupt, Tax Service Association of Illinois, be and it is hereby ordered and decreed to have appeared in this cause generally and has conferred jurisdiction upon this Court to determine the merits of this cause.

Enter:

Philip L. Sullivan,
Judge.

1 June 1937.

92 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

93 IN THE DISTRICT COURT OF THE UNITED STATES.

Tuesday, June 29, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

(Caption—65890)

This day comes the Bankrupt by its Attorney and enters its exceptions to the order approving the Referee's Report. On motion of Solicitor for the Bankrupt It Is Ordered

that he be and the same is hereby given to file amended answer within three (3) days from this date and

It Is Ordered that this cause be and the same is hereby referred to Referee Sullivan.

94 And on, to wit, the 2nd day of July, 1937, came the Alleged Bankrupt by its attorneys and filed in the Clerk's office of said Court a certain Amended Answer in words and figures following, to wit: Filed July 1937.

95 In the District Court of the United States.

(Caption—65890)

AMENDED ANSWER OF TAX SERVICE ASSOCIATION OF ILLINOIS.

And now the said Tax Service Association of Illinois, a corporation, Alleged Bankrupt, and denies that it has committed the acts of bankruptcy set forth in said Petition, or any of them, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said Petition alleged.

And the said Alleged Bankrupt, further answering said Petition, says:

That W. L. Eckley is not a creditor of the alleged bankrupt herein and has not a provable debt against it, and that it does not owe the said W. L. Eckley anything.

That this court has no jurisdiction to adjudicate this respondent a bankrupt for the reason that it is a not for profit corporation and is not a monied business or commercial corporation within the purview of the Bankruptcy Act; and this it prays may be inquired of by the court.

Tax Service Corporation of Illinois,
By Roy G. Harris,
Its President.

96 State of Illinois, } ss.
County of Cook. }

Roy G. Harris, being first duly sworn, on oath deposes and says that he is the President of the Tax Service Association of Illinois, a corporation, respondent herein; that he has read the foregoing Amended Answer by him subscribed, knows the contents thereof, and that the same is true.

Roy G. Harris.

Subscribed and sworn to before me this 2nd day of July, A. D. 1937.

Kathryn G. Lanahan,
Notary Public.

(Seal)

July 7. 97 And on, to wit, the 7th day of July, 1937, came Referee, William M. Sullivan, and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

98 In the District Court of the United States.
(Caption—65890)

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, IN RE PETITION OF DAHL-STEDMAN CO., ET AL., FILED JUNE 29, 1937, AND THE ANSWERS OF BENJAMIN F. J. ODELL, R. G. HARRIS AND TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT, THERETO.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, for the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On June 29, 1937, petitioners, Dahl-Stedman Co., et al., filed a petition herein alleging that they are all of the two hundred seventy-eight (278) contractors who filed their petition herein on May 24, 1937, under the name of Avery Brundage Company, et al., except Avery Brundage Company, which is not a petitioner herein and was included in the petition filed May 24, 1937, by inadvertence; that by agreement and consent to the petitioners, the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of

99 Illinois, a corporation, Benamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago and of the petitioning creditors herein this Court entered upon the petition of petitioners filed May 24, 1937, its order dated May 27, 1937, and, pursuant to said order, Two Hundred Forty-Two Thousand Two Hundred Dollars ($242,200) was paid out of the Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of

Finance of the State of Illinois to apply on account of principal and interest for Illinois Retailers' Occupation Taxes owing by the petitioners and the other contractors having moneys in said Sales Tax Escrow Fund; that since the order of May 27, 1937, was entered the sums in said Sales Tax Escrow Fund had been checked; that the total amount on deposit in said Fund on May 27, 1937, was Three Hundred Fourteen Thousand Nine Hundred Fifty-eight Dollars and Seventy-five Cents ($314,958.75); that of said total amount in said Fund Two Hundred Ninety-seven Thousand Twenty-three Dollars and Five Cents ($297,023.05) was deposited therein by the two hundred seventy-seven (277) petitioners and Seventeen Thousand Eight Hundred Fifty-nine Dollars and Five Cents ($17,859.05) was deposited therein by the contractors represented by respondent, Benjamin F. J. Odell; that there remains in said Fund Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to the two hundred seventy-seven (277) petitioners and Four Thousand One Hundred One Dollars and 100 Seventy Cents ($4,101.70) is the money of and belongs to the contractors represented by Benjamin F. J. Odell; that, pursuant to the order of this Court entered May 27, 1937, all of the respondents have filed answers to the petition of petitioners dated May 24, 1937; that some of the respondents claim an interest in the balance of said Sales Tax Escrow Fund to the extent of Twenty Thousand Dollars ($20,000); that none of them claim any interest in the balance of the Fund over Twenty Thousand Dollars ($20,000); and that of the Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) now in the Sales Tax Escrow Fund which is the money of and belongs to the petitioners, at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to the petitioners, free from any claim or demand of any kind whatsoever; that the petitioners need said Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in their respective businesses; that they are not being paid any interest on said sum and that they are being damaged by the retention of said sum in said Sales Tax Escrow Fund; that they are willing to leave in the Fund, subject to the further order of this Court, Twenty Thousand Dollars ($20,000) of their money until it is finally determined by this Court

whether any person, firm or corporation other than the petitioners have any interest in said Twenty Thousand Dollars ($20,000) or any claim thereto or any part thereof; that each of the petitioners has, by special written authorization, au-
thorized George V. Dahl, Henry P. Reger and Louis Nar-
101 wetz, Sr., as a Special Committee on Illinois Retailers'
Occupation Tax, to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund.

Said petitior prays that this Court order Benjamin F. J. Odell, R. G. Harris and E. N. Craig, and each of them, to sign instanter a joint check for Forty-eight Thousand Five Hundred-Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and deliver said check instanter to said Special Committee or any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payees and presentation of said check for payment.

Upon the same day, June 29, 1937, your Honor entered an order referring said petition and the respective answers thereto of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois to me upon the issues made by said petition and said answers thereto, to report to the Court within a short day my conclusions thereon.

A hearing was held before me on July 6, 1937, on the matters embraced in said reference, which hearing was attended by Sigmund W. David, representing the petitioners, Benjamin F. J. Odell, representing himself, Louis Kutner, representing R. G. Harris, and the Tax Service Association of Illinois, alleged bankrupt, Blanksten and Lansing, represent-
ing petioning creditors, Donald H. Haider, appearing for
102 William J. Flaherty, attorney for William L. O'Connell,
Jr., Receiver of Tax Service Association of Illinois, alleged bankrupt.

A brief statement is necessary for a proper understanding of the issues presented on this reference.

On May 24, 1937, a petition was filed herein on behalf of Avery Brundage Company, et al., the petitioners being the

same persons (except Avery Brundage Company) who filed the petition of Dahl-Stedman Co., et al., on June 29, 1937.

The petition of May 24, 1937, so far as pertinent to the present reference, alleges in substance that a certain Sales Tax Escrow Fund in the National Builders Bank of Chicago was created and controlled by a letter to said bank signed by the respondents, E. M. Craig, R. G. Harris and Benjamin F. J. Odell, and that withdrawals from the account were to be made only on written order of said Odell, Harris and Craig; that there was deposited in said Sales Tax Escrow Fund Three Hundred Fourteen Thousand Eight Hundred Eighty-five Dollars and Ninety-five Cents ($314,885.95); that there was in said fund belonging to the petitioners Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-Nine Cents ($297,534.79) or slightly in excess thereof, a large part of which they needed to pay Illinois Retailers' Occupation Tax; that the petitioners had requested and demanded of said Odell and Harris, among other things, that they execute a check to the order of the Special Committee on Illinois Retailers' Occupation Tax for the amount in said Sales Tax Escrow Fund deposited therein by the 103 petitioners or that they execute a document withdrawing their names as parties whose signatures must be on any check drawn on such Fund; that they had refused to comply with petitioners' request and demand. Said petition prayed, among other things, that Odell, Harris and Craig be ordered to issue a check for Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) to the Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago.

On May 24, 1937, an order was entered by the Court giving leave to the petitioners to file their petition, making William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele and National Builders Bank of Chicago parties respondent to the petition, and ordering O'Connell, Jr., Receiver, Tax Service Association of Illinois, Harris, Odell, Craig and the National Builders Bank of Chicago to file their respective answers to said petition before 10:00 A. M. Thursday, May 27, 1937, and that the matter be set for hearing upon the petition and said

answers before the Court at 10:00 A. M. Thursday, May 27, 1937.

On May 27, 1937, the Court entered an order on the Avery Brundage Company, et al. petition. Said order, before it was signed by the Court, was approved in writing on the last page of the order by Sigmund W. David, attorney for petitioners, E. M. Craig, William J. Flaherty, attorney for William
104 L. O'Connell, Jr., as Receiver, Luis Kutner, for Tax Service Association of Illinois, R. G. Harris, Benjamin F. J. Odell, National Builders Bank of Chicago, by Louis A. Bowman, Assistant Cashier, Blanksten & Lansing, attorneys for petitioning creditors. The first paragraph of said order is as follows:

"This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:".

The order then ordered and decreed that there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of Finance of the State of Illinois, to apply on account of principal and interest owing by the petitioners and the said other contractors for their respective Illinois Retailers' Occupation Taxes Two Hundred Forty-two Thousand Two Hundred Dollars
105 ($242,200) (being seventy-five per cent (75%) of the entire Sales Tax Escrow Fund plus Six Thousand Thirty-five Dollars and Fifty-four Cents ($6,035.54) in interest), and directed that Odell, Harris and Craig sign instanter a joint check for Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) payable to the Department of Finance of the State of Illinois drawn on said Fund. The order also provides as follows:

"4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago,

amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.

"5. That the time for William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."

106 After said agreed order of May 27, 1937, was entered, answers were filed by Odell, Harris, the Tax Service Association of Illinois, William L. O'Connell, Jr., Receiver, N. M. Craig and the petitioning creditors. None of the said answers except those of Odell, Harris and Tax Service Association of Illinois raise any questions which affect this report. The answers of Odell, Harris and Tax Service Association of Illinois were to the effect that, inasmuch as there was then pending before the Court the question of the Court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois, this Court was without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

Thereafter, pursuant to a reference to me, I filed with your Honor a report dated June 22, 1937, on the question of the Court's jurisdiction over the alleged bankrupt. My report was confirmed by an order of this Court entered June 29, 1937, and by said order the special appearance of the alleged bankrupt was stricken, its motion to quash was denied, and this Court decreed that the bankrupt had conferred jurisdiction upon the Court to hear the cause on its merits.

On June 29, 1937, the same day upon which the petition of Dahl-Stedman Co., et al., which has been previously summarized, was filed, the Court entered an order upon said petition. This order recites that petitioners, William L. O'Connell, Jr., Receiver, the Tax Service Association of

Illinois, Odell, Harris, Craig, the National Builders Bank of Chicago and the petitioning creditors appeared in Court, and that none of them made any objection to the entry of an order in accordance with the prayer of the petition of Dahl-Stedman Co., et al. except Odell, Harris and the Tax Service Association of Illinois, who raised the question of the jurisdiction of the Court to enter an order in accordance with the prayer of said petition; that the Court thereupon directed said Odell, Harris and Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition; that Odell requested that his special answer filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al.; that Harris requested that his petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. stand as his answer to the petition of Dahl-Stedman Co., et al.; and that the Tax Service Association of Illinois requested that its petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. stand as its answer to the petition of Dahl-Stedman Co., et al. Said order thereupon provides:

"Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

"1. That the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of Benjamin F. J. Odell to the petition of Dahl-Stedman Co., et al. this 108 day filed; that the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of said R. G. Harris to the petition of Dahl-Stedman Co., et al. this day filed; and that the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of the Tax Service Association of Illinois, alleged bankrupt, to the petition of Dahl-Stedman Co., et al. this day filed.

"2. That the petition of Dahl-Stedman Co., et al. this day filed, and the respective answers of Benjamin F. J. O'Dell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, above set forth, are hereby referred, upon the issues made by said petition and said answers thereto,

to Referee William D. Sullivan to report to this Court within a short day his conclusions thereon."

The only issues presented to me on this reference by the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the answers of Odell, Harris and Tax Service Association of Illinois thereto are (1) the truth of the allegations set forth in the petition, the principal allegations of which are that there is now Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75) in the Sales Tax Escrow Fund in the National Builders Bank 109 of Chicago; that of this amount Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to the petitioners; that there is no claim to any part of said balance remaining in said Sales Tax Escrow Fund except as to Twenty Thousand Dollars ($20,000) thereof; and that at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) of the money of the petitioners in said Sales Tax Escrow Fund belongs to the petitioners, free from all claims and demands; and that each of the petitioners has, by special written authorization, authorized George V. Dahl, Henry F. Reger and Louis Narowetz, Sr. as a Special Committee on Illinois Retailers' Occupation Tax to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund; and (2) the pendency before the Court of the question of the Court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois and, therefore, the question of the jurisdiction of the Court to determine any rights relative to the Sales Tax Escrow Fund.

There is nothing before me to controvert or dispute the truth of the allegations alleged in the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and they, therefore, must be taken as true.

The question whether this Court has jurisdiction to dispose of and distribute the balance in the Sales Tax Escrow Fund, as prayed for by the petition of Dahl-Stedman Co., et al., is determined by two orders of this Court; (1) the 110 agreed order entered by this Court on May 27, 1937, upon the petition of Avery Brundage Company, et al., and (2) the order of June 29, 1937, approving my report as Special Master on the question of the Court's jurisdiction over the alleged bankrupt.

It will be noted that Harris, Odell and the Tax Service Association of Illinois agreed to and approved in writing this Court's order of May 27, 1937, and that that order Specifically provided that the balance of the money (after the withdrawal of the Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) in the Sales Tax Escrow Fund in the National Builders Bank of Chicago amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) should remain and be held in said Escrow Fund in the National Builders Bank of Chicago subject to the further order of this Court and that "all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago are hereby referred to Referee William L. Sullivan upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto".

The answers of Odell, Harris and the Tax Service Association of Illinois to the petition now before me of Dahl-Stedman Co., et al. filed June 29, 1937, are to the effect that the Court has no jurisdiction of the petition because there is pending and undetermined before the Court the question of the Court's jurisdiction over the alleged bankrupt corporation. These answers were originally filed to the petition of Avery Brundage Company, et al. filed May 24, 1937. At that time the alleged bankrupt corporation had filed a motion to quash the service upon it on the ground that the service was invalid and, therefore, the Court had no jurisdiction.

As to such motion, your Honor, on June 29, 1937, entered on order approving my report as Special Master, such order further finding that the alleged bankrupt had waived the question of irregularity or invalidity of the service of process upon it and had conferred jurisdiction upon the Court to hear the motion on the merits, such order further decreeing that the special appearance of the alleged bankrupt be stricken, that its motion to quash and its supporting affidavit stand as its answer to the involuntary petition in bankruptcy, and that the alleged bankrupt had appeared in this cause generally and had conferred jurisdiction on the Court to determine the merits of this cause.

The respondents Odell, Harris and Tax Service Associa-

tion of Illinois having, by their free and voluntary act, agreed to and approved in writing the order entered by your Honor on May 27, 1937, on the petition of Avery Brundage Company, et al., and your Honor having, in your order of June 29, 1937, decreed that the Court has jurisdiction to determine the merits of the involuntary petition in bankruptcy filed herein and the answer of the alleged bankrupt coporation thereto, it is my conclusion that there is no merit in the contention now made by Odell, Harris and the Tax Service Association of Illinois, namely: that the Court has now
112 no jurisdiction to enter any order on the petition of Dahl-Stedman Co., et al.

The respondents Odell, Harris and the Tax Service Association of Illinois have not answered the petition of Dahl-Stedman Co., et al. on the merits and, as is evidenced by the order of reference of this Court of June 29, 1937, they did not desire to answer said petition on the merits. The order of June 29, 1937, specifically directs me to report my conclusions upon the issues made by the petition of Dahl-Stedman Co., et al, and the answers thereto of Odell, Harris and the Tax Service Association of Illinois.

On said issues I find that the allegations of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, are true; that the answers of Odell, Harris and the Tax Service Association of Illinois raise the question of jurisdiction only; that said answers do not present a good defense to said petition; and that the Court has jurisdiction over the Sales Tax Escrow Fund in the National Builders Bank of Chicago, the distribution thereof and of the parties thereto, including Benjamin F. J. Odell, R. G. Harris, E. M. Craig, the Tax Service Association of Illinois and the National Builders Bank of Chicago.

I, therefore, respectfully recommend that an order be entered granting the prayer of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, to the following effect: that this Court order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for
113 Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and deliver said check instanter to said Special

Committee or to any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payees and presentation of said check for payment; and that the balance remaining in said Sales Tax Escrow Fund in the National Builders Bank of Chicago shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court.

I am transmitting herewith the following papers:

Petition of Dahl-Stedman Co., et al. filed June 29, 1937.

Special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937.

Petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937.

Petition of Tax Service Association of Illinois filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937.

Respectfully submitted,

Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, July 7, 1937.

114 And on, to wit, the 8th day of July, 1937, came Referee William L. Sullivan and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

115 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, CONCERNING REFERENCE OF CAUSE.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, for the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On June 29, 1937, Your Honor entered an order granting leave to the alleged bankrupt corporation to file an amended

answer to the involuntary petition in bankruptcy theretofore filed against it, and referred the matter to me as special master.

On July 2, 1937, after some discussion with the attorneys for the alleged bankrupt corporation and the involuntary petitioners, who were before me on another phase of the case, I ordered, on my own motion, that the hearing on the involuntary petition and the amended answer of the alleged bankrupt corporation be set down for hearing on September 21, 1937, at 10 A. M. From the discussion had I then felt that the latter date was not under the circumstances altogether unsatisfactory to the attorney for the alleged bankrupt corporation.

116 On July 6, 1937, the attorney for the alleged bankrupt corporation appeared before me and moved that the cause be set for trial "pursuant to rules in bankruptcy." He stated, in effect, that he desired the matter of the involuntary petition and the amended answer of the alleged bankrupt corporation heard at an earlier date than September 21, 1937—which was the date I had theretofore set for such hearing—and he directed my attention to Rule 12 of the Bankruptcy Rules of the United States District Court, which rule reads, in part, as follows:

"If an order of reference be made, it may contain appropriate provisions requiring indemnity by the parties or their attorneys or any of them for the expenses of the reference. Any such reference shall proceed from day to day, and if any of the parties fail so to proceed the Master shall promptly report that fact to the Court, with such recommendations as may appear to him to be appropriate. The Master's report shall be filed with the Clerk within ten days after the conclusion of the hearings."

In relation to the latter motion of the alleged bankrupt corporation for an earlier hearing, the attorney for the involuntary petitioning creditors objected and stated it would take him some time to prepare his side of the case, and that as it would be necessary for him to prove the insolvency of the alleged bankrupt corporation, he would have to employ an auditor to go over its books, et cetera.

117 The position of the alleged bankrupt corporation, in substance, is that while the involuntary petition is pending against it, its business is practically at a standstill. However, on June 29, 1937, Your Honor entered an order author-

izing the receiver to continue the operation of the offices and business of the alleged bankrupt.

Both the attorney for the alleged bankrupt corporation and the involuntary petitioners stated that the hearing on the involuntary petition would be protracted, each intending to call a large number of witnesses.

I stated to the attorneys that it would be impossible for me to hear the matter before September, if the hearing of evidence and the consideration of the matters presented would necessitate a great amount of time. I made such statement for the reason that my time between now and my annual vacation will be practically all taken up with matters already set or with matters I now have under advisement and upon which I will be required to report before leaving on my annual vacation. I have already booked passage and made all arrangements for my wife and myself to leave for Europe on July 23rd next on my annual vacation.

While it is, of course, only right and proper that a corporation, against whom an involuntary petition in bankruptcy is filed, should be entitled to an early hearing
118 consistent with the convenience and rules of the court, yet in this case the alleged bankrupt corporation certainly had done nothing up to this time to facilitate an early hearing upon the involuntary petition against it. The involuntary petition was filed on May 3, 1937. It contained the necessary jurisdictional allegations. On May 18, 1937, the alleged bankrupt corporation moved to quash the service of process upon it on the ground that such service was void because the person served was not, at the time of the service, associated in any capacity with the alleged bankrupt corporation.

On June 29, 1937, Your Honor entered an order confirming my report as special master relative to the bankrupt's motion to quash. In such order, Your Honor denied the alleged bankrupt corporation's motion to quash the alleged service of process and return thereon, and granted leave to the alleged bankrupt corporation to file an amended answer which was only filed on July 2, 1937.

At the hearing before me this morning on the motion of the attorney for the alleged bankrupt corporation, which was to set the involuntary petition and the amended answer for hearing earlier than September 21, 1927, I advised the attorneys that, if it is insisted that the matter be heard by me

before September, 1937, I would be impelled to request Your Honor to vacate the reference to me, and I so respectfully request accordingly as it would be a physical impossi-
119 bility for me to enter into a protracted and extended hearing upon the involuntary petition and the amended answer and to file my report as special master within ten days after the conclusion of the hearings, as required by Rule 12 above referred to, before leaving for Europe on my annual vacation concerning which I made all arrangements many months ago.

Respectfully submitted,

Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, July 6, 1937.

120 And afterwards, to wit, on the 9th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered 1937.

121 In the District Court of the United States.

* * (Caption—65890) * *

Friday, July 9, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

On motion of Benjamin F. J. Odell and R. G. Harris It Is Ordered that leave be and the same is hereby given them to file exceptions to the Report of the Referee within two (2) days from this date and

It Is Ordered that the hearing on the exceptions to the Report of the Referee be and the same is hereby set for hearing July 27, A. D. 1937.

122 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

6 July 1937. 123 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—65890) • •

This day come Benjamin F. J. Odell and Roy G. Harris by their attorneys and enter their motion for an extension of time within which to file exceptions to the report of Referee William L. Sullivan of June 29, A. D. 1937 which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris duly except.

July 12, 124 And on, to wit, the 12th day of July, 1937, came Benj. F. J. Odell et al. by their attorneys and filed in the Clerk's office of said Court certain Joint Exceptions in words and figures following, to wit:

125 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—65890) • •

JOINT EXCEPTIONS OF BENJ. F. J. ODELL AND ROY G. HARRIS TO THE REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY IN RE PETITION OF DAHL-STEDMAN CO., ET AL., FILED JUNE 29TH, 1937.

Now comes Benj. F. J. Odell and Roy G. Harris, respondents, and except to the Referee's report on the following grounds to-wit:

1. The order of reference to the Referee dated June 29, 1937, on which his said report was based, stated erroneous facts in that the said order which was presented to the court for signature in the absence of all other counsel and without their approval states that the court directed these respondents to answer said petition and that respondents stated that they did not desire to answer said petition. Said statement is untrue as respondents did not state to the court that they did not desire to answer said peition, but did state to the court that special answers were filed questioning the jurisdiction of the court to the petition of Avery Brundage Company, et al., and thereupon the court directed respondent Odell to draft an order designating that the special answers of re-

spondents theretofore filed June 3, 1937, stand to the
126 petition of Dahl-Stedman Co., et al., dated June 29, 1937.
The said erroneous portion of said order misled the Referee in his statement of the facts and likewise in his conclusions thereon.

2. The Referee erred in stating that the only issues presented to him on said reference were (1) the truth of the allegations set forth in the petition and (2) the pendency before the court of the question of the court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois and thereby the question of the jurisdiction of the court to determine rights relative to the Sales Tax Escrow Fund. On the issues made by the said petition and special answers, the merits of the petition or the truth of the allegations were not an issue.

3. The Referee erred in finding that there was nothing before him to controvert or dispute the truth of the allegations in the said petition and that they must therefore be taken as true. The question of the merits of the petition or the truth thereof were not any part of the issues referred to said Referee for decision as the only issue made up by the said petition and respondents' special answers were as to the jurisdiction of the court over the said funds pending the determination of jurisdiction in the bankruptcy proceedings and over the alleged bankrupt.

4. The Referee erred in holding that the jurisdiction of the court to dispose of and distribute the Sales Tax Escrow balance was determined by the order of court of May 27,
1937 and the order of June 29, 1937 because if that were
127 true the court would have been making an idle gesture
in referring to the Referee matters determined and already settled by the court's previous orders.

5. The Referee erred in finding that the order of May 27, 1937, waived jurisdictional pleas because 75 per cent of the fund was, by agreement of counsel, ordered paid to the Department of Finance of the State of Illinois. It was at the solicitation and suggestion of the court that said 75 per cent of the funds were distributed to the Department of Finance for the various petitioners in order to avoid a penalty against said petitioners for failure to pay said taxes within the allotted time, and it was stated by respondents and agreed to in open court that the consent requested by the court to such distribution would not prejudice the rights of respondents to

have determined the question of the jurisdiction of the court over the 25 per cent balance of said funds.

6. The Referee erred in holding that the alleged bankrupt had appeared in the cause generally and conferred jurisdiction on the court to determine the merits of the cause. If the alleged bankrupt cannot be involuntarily declared a bankrupt under the bankruptcy act, and is exempt therefrom, the court can have no jurisdiction over it, nor can the alleged bankrupt itself give the court jurisdiction when the bankruptcy act itself expressly provides otherwise.

7. The Referee erred in holding that respondents, by their free and voluntary act in approving the written order of May 27, 1937, conferred jurisdiction on the court, be-
128 cause the trial court being fully advised as to the jurisdictional questions over the alleged bankrupt directed all attorneys to sign the order so there would be no question about the court's right to distribute the 75 per cent of said funds as aforesaid. The said order was a collateral matter to the vital issues of bankruptcy jurisdiction over the alleged bankrupt.

8. The Referee erred in holding that on the pleadings before him that there was no merit in the contentions made by the special answer of respondents questioning the jurisdiction of the court pending the determination of the court's jurisdiction over the alleged bankrupt.

9. The Referee erred in holding that respondents did not desire to answer said petition on the merits as respondents are not called upon to answer said petition of the merits until the jurisdictional questions raised are finally determined and disposed of as the raising of a jurisdictional question did not deprive respondents of their right to answer to the merits, which they now specially reserve the right to do in the event they should so elect should the jurisdictional question over the alleged bankrupt and said fund be decided adversely.

10. The Referee erred in finding that the allegations of the petition are true because respondents' answers did not present a good defense to said petition and that the court thereby has jurisdiction over the said escrow fund and the distribution thereof.

129 11. The Referee erred in recommending that the court order respondents and other escrowees to sign any checks in any amount as the Referee did not have said issue before him and transcended his jurisdiction in so recommending.

12. The Referee erred in not finding that the determination of the jurisdiction of the court over the said funds could not be determined until the question of the jurisdiction of the United States District Court over the alleged bankrupt was first determined.

In conclusion respondents specially except to this court's violation of Rule No. 14 of the Bankruptcy Act as follows:

"The petition for review of a referee's order shall be filed with the referee within ten days after the order is made, unless, before the expiration of such period, the time be extended by the Court or the referee in charge of the case. Where the order is the result of a decision upon a contested matter, the time within which to file the petition for review shall begin to run from the date of the service of a copy of the referee's order upon the adverse party."

And also to this court's violation of Rule No. 66 for Courts of Equity of the United States as follows:

"The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the equity docket. The parties shall have 20 days from the time of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

130 because respondents have been deprived of sufficient time to properly prepare themselves and exhaustively search for authorities to support the jurisdiction and other contentions set forth herein. The court allowed respondents in violation of said Rules only two days to file their exceptions and further ordered the arguments thereon set for the third day.

These respondents, your exceptors, therefore pray that their said exceptions may be heard and sustained.

Benj. F. J. Odell,
Respondent Pro Se.

Roy G. Harris,
By Luis Kutner,
His Attorney.

July 12, 1937.

ered July 2, 1937.

131 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedinsg thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

132 IN THE DISTRICT COURT OF THE UNITED STATES.

Monday, July 12, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

(Caption—65890)

This day come Benjamin F. J. Odell and Roy G. Harris by their Attorneys and enter their motion for leave to file Second Amended Supplemental Answer to the petition of Dahl-Stedman, et al. which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris duly except.

133 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

134 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

ORDER.

This matter coming on to be heard upon the motion of petitioners, Dahl-Stedman Co., et al. for the entry of an order herein approving the report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, pursuant to the reference to the order of this Court entered June 29, 1937, and making findings and orders in accordance with the prayer of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the recommendations of said William L. Sullivan contained in his said report; and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M.

Craig and National Builders Bank of Chicago, the petitioning creditors in these proceedings, and certain other parties represented by the law firm of Hopkins, Starr & Hopkins having received notice of said motion of the petitioners,
135 Dahl-Stedman Co. et al., and all of said parties having appeared in court in person or by counsel, and

Said Benjamin F. J. Odell and R. G. Harris having asked and obtained leave to file their respective exceptions to said report of William L. Sullivan and having filed the same, and this matter thereupon coming on to be heard upon the aforesaid motion of petitioners and the said exceptions to said report of William L. Sullivan filed by Benjamin F. J. Odell and R. G. Harris, and

The Court having heard the arguments of counsel and being fuly advised in the premises, Doth Find that:

(a) None of the respondents or the petitioning creditors or the parties represented by Hopkins, Starr & Hopkins, except Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, have made any objection to the entry of an order in accordance with the motion of Dahl-Stedman Co., et al., petitioners.

(b) The allegations of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, are true.

(c) The answers of Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, alleged bankrupt, to said petition of Dahl-Stedman Co., et al. filed June 29, 1937, raise the question of jurisdiction of this Court only; that said answers do not present a good defense to said petition; that this Court has jurisdiction over the certain account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago, which has been specifically referred to and is
136 more fully described in the order of this Court in this cause entered May 27, 1937, on the petition of Avery Brundage Company, et al., and has jurisdiction of the distribution of said Sales Tax Escrow Fund and of the parties thereto, including Benjamin F. J. Odell, R. G. Harris, E. M. Craig, the Tax Service Association of Illinois, and the National Builders Bank of Chicago.

(d) The balance now remaining in said Sales Tax Escrow Fund in the National Builders Bank of Chicago is Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the proceeds of checks of the petitioners which

were deposited in said Sales Tax Escrow Fund, and of said Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40), Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to the petitioners, free from any claim or demand of any kind whatsoever of any of the respondents.

(e) George V. Dahl, Henry P. Roger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, are authorized to receive, on behalf of the petitoners, the moneys belonging to petitioners in said Sales Tax Escrow Fund in the National Builders Bank of Chicago.

It Is, Therefore, Ordered, Adjudged and Decreed:

1. That the exceptions of Benjamin F. J. Odell and R. G. Harris heretofore filed to the report of William L. Sullivan in re the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the answers of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, thereto, which said report was filed with the Clerk of this Court on July 7, 1937, pursuant to an order of reference contained in the order of this Court entered June 29, 1937, be and the same are hereby overruled, and said report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, is hereby in all respects approved.

137

2. That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig; and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund at the National Builders Bank of Chicago, upon endorsement of said check by said payees and upon presentation of said check for payment.

3. That after the payment of said check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), the balance remaining in said Sales Tax Es-

crow Fund in the National Builders Bank of Chicago
138 amounting to Twenty-four Thousand One Hundred Seventy-eight Dollars and Thirty-five Cents ($24,178.35) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court; and all claims and rights in and to said balance in said Sales Tax Escrow Fund in said National Builders Bank of Chicago are again hereby referred to William L. Sullivan, a Referee of this Court, upon the petition of Avery Brundage Company, et al., filed herein May 24, 1937, and the answers and other pleadings filed and which may hereafter be filed thereto.

Enter:

Philip L. Sullivan,
Judge.

July 12, 1937.

To all of which exceptions are jointly and severally taken by Benjamin F. J. O'Dell and Roy G. Harris.

Enter:

Philip L. Sullivan,
Judge.

July 12, 1937.

139 And afterwards, to wit, on the 13th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered July 13, 1937.

140 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the motion of petitioners, Dahl-Stedman Co., et al., for the entry of an order herein striking the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al., filed May 24, 1937 and striking the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937, and striking the petition of Tax Service Association of Illinois, alleged

bankrupt, filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937; and ordering Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, to file within ten (10) days their respective answers to the merits of the petition of Avery Brundage Company, et al., filed May 24, 1937, as to the balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Builders Bank of Chicago claimed by the petitioners to belong to them after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937, and

141 The Court being fully advised in the premises, Doth Find that:

(a) The special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al., filed May 24, 1937, the petition of R. G. Harris filed June 3, 1937, to strike said petition of Avery Brundage Company, et al., and the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the said petition of Avery Brundage Company, et al., raise only the question of jurisdiction of this Court; that said answer and petitions to strike do not present a good defense to said petition of Avery Brundage Company, et al.; this Court has jurisdiction over the balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Builders Bank of Chicago and claimed by petitioners to belong, after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937, and has jurisdiction of the distribution of said Twenty Thousand Dollars ($20,000).

It Is, Therefore, Ordered Adjudged and Decreed:

1. That the motion of petitioners, Dahl-Stedman Co., et al., this day made is allowed.

2. That said special answer of Benjamin F. J. Odell, the said petition to strike of R. G. Harris, and the said petition to strike of Tax Service Association of Illinois, alleged bank-

142 rupt, all filed June 3, 1937, are hereby stricken.

3. That Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, file within Twenty (20) days their respective answers to the merits of the petition of Avery Brundage Company, et al., filed May 24, 1937, as to said balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Build-

ers Bank of Chicago claimed by the petitioners to belong to them after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937.

Enter:

Philip L. Sullivan,
Judge.

July 13, 1937.

194 And on, to wit, the 21st day of July, 1937, came Dahl-Stedman Co., et al., by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed July 21 1937.

195 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION.

To the Judges of the District Court of the United States.

1. Your petitioners, Dahl-Stedman Co., et al., respectfully represent that on July 12, 1937, upon the motion of petitioners for the entry of an order approving the report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, pursuant to the reference in the order of this Court entered June 29, 1937, and making findings and orders in accordance with the prayer of the petition of Dahl-Stedman Co., et al., filed June 29, 1937, and the recommendations of said William L. Sullivan contained in his report, and upon the exceptions to said report of William L. Sullivan filed by respondents, Benjamin F. J. Odell and R. G. Harris, this Court entered an order providing, among other things, as follows:

"That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-
196 eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: 'Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig,' and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to any member thereof, or

to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund at the National Builders Bank of Chicago, upon endorsement of said check by said payees and upon presentation of said check for payment."

A copy of said order entered by this Court on July 12, 1937, is marked "Exhibit A", hereto attached and incorporated herein with the same force and effect as if it had been set out in this petition in full. The said Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago had due notice of the entry of said order, and said order remains in full force and effect, unreversed, and no stay thereof has been granted or allowed by this or any other Court.

2. That the said E. M. Craig, so far as he is individually able to do so, has fully complied with said order by signing a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed "Sales Tax Escrow Fund, by E. M. Craig," and delivering said check, so signed, to Sig-
197 mund W. David, attorney for petitioners, and the National Builders Bank of Chicago has informed petitioners that it is willing to comply with the terms of said order applicable to it.

3. That there is now in the said Sales Tax Escrow Fund in the National Builders Bank of Chicago Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), subject to the order of the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig under the terms and provisions of said order of this Court of July 12, 1937.

4. That said Benjamin F. J. Odell and R. G. Harris, and each of them, have utterly failed, neglected and refused to carry out and perform the terms and requirements of said order and have failed, neglected and refused to sign a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and have utterly failed, neglected and refused to deliver any such check to the Special Committee on

Illinois Retailers' Occupation Tax or to any member thereof or to Sigmund W. David, attorney for petitioners, and said Benjamin F. J. Odell and R. G. Harris, and each of them, still persist in their refusal, neglect and failure to sign and deliver said check; that said failure, neglect and refusal on the part of said Benjamin F. J. Odell and R. G. Harris to sign
198 said check, described in said order, and to deliver said check as in said order provided, is willful, contumacious and in contempt of this Court and the process thereof.

Your petitioners, therefore, pray that an order may be entered herein directing said Benjamin F. J. Odell to show cause in writing on or before the 26th day of July, A. D. 1937, why he should not be punished for contempt of court for willfully and contumaciously failing, neglecting and refusing to obey and comply with said order of this Court entered herein on July 12, 1937, and directing said R. G. Harris to show cause in writing on or before the 26th day of July, A. D. 1937, why he should not be punished for contempt of court for willfully and contumaciously failing, neglecting and refusing to obey and comply with said order of this Court aforesaid entered herein on July 12, 1937.

And your petitioners will ever pray.

Dahl-Stedman Co. and the other individuals, partnerships and corporations who are petitioners herein,
By George V. Dahl,
Henry P. Reger, and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax, authorized to act for and sign this petition on behalf of all the petitioners.

Sigmund W. David,
Attorney for petitioners.

199 State of Illinois, }
County of Cook. } ss.

George V. Dahl, being first duly sworn, on oath deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as a Special Committee on Illinois Retailers' Occupation Tax and author-

ized to act on behalf of the petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf and makes this affidavit on behalf of all the petitioners. Affiant further says that he has read the above and foregoing petition and knows the contents thereof, and that the matters and things therein stated are true in substance and in fact.

Geo. V. Dahl.

Subscribed and sworn to before me this 20th day of July, 1937.

(Seal) William J. Lederer,
Notary Public.

Note: Order of July 12, 1937, attached, marked Exhibit A, not copied.

July 21, 200 And afterwards, to wit, on the 21st day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

201 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—5890) * *

ORDER.

This cause coming on to be heard before this Court upon the petition of Dahl-Stedman Co., et al., this day filed, for a rule on Benjamin F. J. Odell and R. G. Harris to show cause why they, and each of them, should not be punished for contempt of this Court for willfully and contumaciously failing, neglecting and refusing to comply with and obey the order of this Court entered herein on July 12, 1937, and the Court having considered said petition and the files, records and proceedings herein, and the said petitioners herein appearing herein by Sigmund W. David, their attorney, and the said Benjamin F. J. Odell appearing in person and the said R. G. Harris appearing herein by Luis Kutner, his attorney; and

The Court being fully advised in the premises, finds that:

1. On July 12, 1937, this Court entered an order herein

providing, among other things, that the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, 202 sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig," and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to Sigmund W. David, attorney for petitioners.

2. There is now in the said Sales Tax Escrow Fund in the National Builders Bank of Chicago Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), subject to the order of the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig under the terms and provisions of the said order of this Court of July 12, 1937.

3. That E. M. Craig has fully and completely complied with the terms of said order so far as he is individually able to do so, and has signed a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Escrow Fund in the 203 National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by E. M. Craig," and has delivered said check to Sigmund W. David, attorney for petitioners.

4. That Benjamin F. J. Odell and E. M. Craig, and each of them, have utterly failed, neglected and refused to carry out and perform the terms and requirements of said order, and have failed, neglected and refused to sign a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and signed as follows: "Sales Tax Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig," and have utterly failed, neglected and refused to deliver such a check instanter to said Special Committee on Illinois Retailers' Occupation Tax

or to any member thereof, or to Sigmund W. David, attorney for petitioners.

It Is, Therefore, Ordered, Adjudged and Decreed that Benjamin F. J. Odell show cause in writing on July 31, 1937 at the hour of 10:00 o'clock A. M. before this Court, why he should not be punished by this Court for willfully and contumaciously failing, neglecting and refusing to comply with and
obey the order of this Court entered herein on July 12,
204 1937, and that R. G. Harris show cause in writing on July 31, 1937, at the hour of 10:00 o'clock A. M. before this Court, why he should not be punished by this Court for willfully and contumaciously failing, neglecting and refusing to comply with and obey the order of this Court entered herein on July 12, 1937.

Enter:

Holly,
Judge.

July 21, 1937.

ed July 1937.

143 And afterwards, to wit, on the 23rd day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

144 In the District Court of the United States.

* * (Caption—65890) * *

ORDER.

This cause coming on to be heard upon the motion of Roy G. Harris, Tax Service Association of Illinois and Benjamin F. J. Odell, by their respective attorneys, on written motion for leave to reserve exceptions to the order of July 13, 1937, requiring the above named parties to answer to the merits of the Avery Brundage Company, et al., petition, heretofore filed herein, and the Court, being fully advised in the premises, hereby grants leave to the above parties to reserve their exceptions to the order of July 13, 1937, and the same are hereby reserved.

Enter:

Holly,
Judge.

July 23, 1937.

205 And on, to wit, the 30th day of July, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Joint Motion in words and figures following, to wit: Filed July 1937.

206 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

JOINT MOTION TO DISMISS PETITION AND QUASH RULE TO SHOW CAUSE.

Now come Roy G. Harris and Benjamin F. J. Odell and move the Court to dismiss the petition and quash the rule to show cause, heretofore filed July 21, 1937, for the following reasons:

1. These respondents submit that on the 12th day of July, 1937, before his Honor Judge Philip L. Sullivan, when order was entered on petition of Dahl-Stedman Co., et al., in this cause, the following conversation took place between counsel at this hearing and his Honor Judge Sullivan:

"Mr. David: I have a check here and I asked the gentlemen whether they would sign it, in view of the court order. They said no, they are going up. In view of the fact that your Honor is leaving town, I think that if they have a right to appeal, which I doubt, because I don't believe either one of them has any appealable interest—* * *

The Court: What do you think the amount of the bond ought to be?

Mr. Odell: There is no petition before the Court yet, your Honor. I think Mr. David is a little previous.

The Court: Well, I do that very often, however, if you promise that you are going to take an appeal; I mean assuming that you have an appealable interest. Now, at the
207 time that statement is made I set the amount of the bond and so forth, as a matter of convenience, if nothing else.

Mr. Odell: Well, I think it should be for costs only, if it is a matter of the amount of the bond, because the funds are all intact. No one is getting them or taking them. They are not in any way touched. There is no detriment, and we should be able to get an appeal disposed of at the October term. * * *

(Lengthy discussion of counsel then took place as to the amount of the bond.)

The Court: Bond a thousand dollars.

Mr. David: The costs would be more than that, your Honor.

Mr. Kutner: How can you say that?

Mr. David: Because if they are keeping the distribution of this fund for that length of time, let's say that the appeal is granted and they keep the $48,500 that they are going to distribute; now, if it were distributed the parties to whom it would be distributed would be in—could place it where it would draw interest.

The Court: No, only a cost bond; a thousand dollars. * * *"

The interpretation put upon this language by counsel for said respondents was that the appeal would take place in due course and that the fixing of the bond was tantamount to a stay of the order of July 12, 1937, requiring the signing of said check instanter because the refusal to sign the same was made in the presence of his Honor Judge Sullivan with the knowledge of all counsel present and the arranging of the bond following such knowledge was a completion of the interpretation and meeting of the minds of court and counsel.

2. Further answering these respondents say that they have continually worked toward the perfection of their
208 appeal and have had no intention at any time, or have any intention now, to violate any orders of the court but do desire to preserve and prosecute their rights as allowed by law.

3. Further answering these respondents deny they have committed any act which may be construed as contempt of the order of July 12, 1937.

4. Further answering these respondents aver that the order of July 12, 1937, directed these respondents to sign instanter the check calling for the payment of $48,584.40; that their frank disclosure to the Court at that time of their intention to appeal relieves them of any and all burdens of conduct which may be construed as contemptuous.

5. Further answering these respondents say that counsel for petitioners at said time did not disclose to the Court a contrary interpretation as to the discussion which then took place nor did they disclose a contrary interpretation at the succeeding hearing when they appeared the succeeding day before his Honor Judge Sullivan on another petition in said cause.

6. Further answering these respondents say that the petition and the rule to show cause is filed in bad faith and in

total disregard to the clear language of the Court in fixing the amount of the appeal bond and therefore should be stricken from the files; that the petitioners by their petition for rule to show cause are attempting to distort and circumvent the sincere statements by these respondents of their intention to perfect an appeal.

209 7. Further answering these respondents aver that in compliance with the suggestion of his Honor Judge Sullivan they a now expeditiously perfecting their appeal.

Respondents therefore submit, that as stated above, the order entered herein, calling upon the respondents to show cause, should be quashed and the petition as the foundation thereof should be dismissed and stricken from the files, and respondents so pray.

Roy G. Harris,
Benjamin F. J. Odell.

July 30, 1937.

State of Illinois, } ss.
County of Cook. }

Roy G. Harris and Benjamin F. J. Odell being first duly sworn on oath depose and say that they have read the foregoing answer and know the contents thereof and state that the same are true in substance and in fact except as to those portions that are founded upon information and belief and as to such portion believe it to be true.

Roy G. Harris,
Benjamin F. J. Odell.

Subscribed and sworn to before me this 29th day of July, 1937.
(Seal)

Ruth V. Willner,
Notary Public.

210 And on, to wit, the 30th day of July, 1937, came the Alleged Bankrupt, et al. by their attorneys and filed in the Clerk's office of said Court a certain Special Answer in the words and figures following, to wit:

July 30. 211 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

SPECIAL ANSWER TO THE PETITION OF AVERY BRUNDAGE CO., ET AL., ON ORDER OF JULY 13, 1937, TO ANSWER TO THE MERITS.

The Tax Service Association of Illinois, Alleged Bankrupt, Roy G. Harris and Benjamin F. J. Odell, in compliance with the order of July 13, 1937, directing the above mentioned parties to answer to the merits of the petition of Avery Brundage Co., et al., heretofore filed, for such answer say:

1. That the above respondents heretofore filed petition to strike the petition of Avery Brundage Co., et al., raising the question of this court's jurisdiction over the "Sales Tax Escrow Fund" and that said petition and the petition of Avery Brundage Co., et al., were referred for a hearing to Referee William L. Sullivan;

2. That a hearing was had upon the foregoing and the report of the said referee was filed wherein it was found that the above mentioned respondents had conferred jurisdiction upon this court by consenting to the order of May 27, 1937, and that this court had jurisdiction of the fund for all purposes.

212 3. That an order was entered by this Court approving the report of said Referee to which your respondents duly excepted and are now perfecting an appeal therefrom.

4. That the question of jurisdiction over the subject matter of the alleged bankrupt is now pending undisposed of and undetermined before this Court, said question of jurisdiction of the subject matter being raised in the amended answer of the alleged bankrupt.

5. That the order of July 13, 1937, striking the several petitions to strike the petition of Avery Brundage Co., et al., and the further order directing the respondents to answer to balance of the fund therein remaining in the "Sales Tax Escrow Fund".

6. That these respondents, jointly and severally, aver that in view of their intention to perfect an appeal to the Circuit Court of Appeals for the Seventh Circuit, reviewing the order of July 12, 1937 and other orders theretofore and subsequently entered, these respondents now specifically re-

serve the right in his answer to question the jurisdiction of this court in so requiring them to answer to the merits as hereinabove alleged.

7. These respondents further answering aver that in view of the foregoing to specifically reserve the exception to the order of July 13, 1937, directing these respondents to answer to the merits and that said reservation should continue until the question of jurisdiction over the alleged bank-
213 rupt is determined before this Court and the jurisdiction of this Court over your respondents relative to the Escrow Fund finally determined by the Circuit Court of Appeals for the Seventh Circuit, your respondents should not be compelled to answer to the merits.

And your respondents will ever pray.

Tax Service Association of Illinois, Alleged Bankrupt.
Roy G. Harris,
By Luis Kutner,
Their Attorney.
Benjamin F. J. Odell,
Counsel Pro Se.

July 30, 1937.

145 And on, to wit, the 30th day of July, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Petiton for Appeal and Severance in words and figures following, to wit: Filed July 30, 1937.

146 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION FOR APPEAL AND SEVERANCE.

Now comes Roy G. Harris of Du Page County, Illinois and Benjamin F. J. Odell, of Cook County, Illinois, and conceiving themselves aggrieved, by the order of this Court in the above entitled cause, entered on the 12th day of July and the 13th day of July 1937, on the petitions of Dahl-Stedman Company, et al., and Avery Brundage Company, et al., respectively, in the above entitled proceedings, appeal from said orders to the Circuit Court of Appeals for the Seventh Circuit of the United States, and pray that this appeal may be allowed; and that a transcript of the record upon which

said orders were made, duly authenticated, may be sent to the Circuit Court of Appeals for the Seventh Judicial Circuit of the United States, and that said orders may be reversed.

Your petitioners respectfully show to the Court that on July 26, 1937 they notified, in writing, William L. O'Connell, Receiver for the Tax Service Association of Illinois, alleged bankrupt, E. M. Craig, one of the escrowees of a certain fund in dispute, the National Builders Bank of Chicago, depositary where said disputed funds are kept, Otto C. Bentner, and Blanksten & Lansing, Attorneys for petitioning creditors of these petitioners' intention to pray an appeal and asked them whether they would or would not join in said appeal in said cause and to so advise petitioners in writing in reply to said inquiry but your petitioners have not been advised in writing that any of said notified parties desire to join in this appeal.

Wherefore petitioners pray for an order of severance and for the granting of an appeal as above prayed.

Luis Kutner,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

Dated: July 30, 1937.

Entered Aug. 2, 1937.

147 And afterwards, to wit, on the 2nd day of August, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

148 In the District Court of the United States.

* * (Caption —65890) * *

Monday, August 2, A. D. 1937.

Present: Honorable Charles E. Woodward, District Judge.

This day come Benjamin F. J. Odell and Roy G. Harris by their Attorneys and enter their motion for order of severance and appeal and for leave to file Assignment of Errors which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris except.

149 And on, to wit, the 25th day of September, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Notice of filing Praecipe in words and figures following, to wit:

150 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

NOTICE OF FILING PRAECIPE.

To: David & Fainman
38 South Dearborn Street
Chicago, Illinois

Please take notice that on or before the 25th day of September, 1937, the undersigned will file with the Clerk of said Court, on the appeal allowed in the above entitled cause, a praecipe showing particular parts of the record of this case needed for review by the upper Court, a copy of which praecipe is herewith served upon you as Attorneys for Avery Brundage Company and Dahl-Stedman Company, et al., as Appellees.

Kenart M. Rahn,
Attorney for Roy G. Harris, et al.
Benjamin F. J. Odell,
Counsel Pro Se.

September 21, 1937.

Received a copy of the above and foregoing notice, together with copy of praecipe referred to therein, this 21st day of September, 1937, at 4:45 P. M.

Sigmund W. David,
Attorneys for said Appellees.

214 And on, to wit, the 29th day of September, 1937, came Dahl-Stedman Co. et al. Appellees by their attorney and filed in the Clerk's office of said Court a certain Notice in words and figures following, to wit:

215 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—65890) * *

NOTICE.

To: Kenart M. Rahn,
7 S. Dearborn Street,
Attorney for Appellants.

Please take notice that on or before September 30, 1937, I shall file with the Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, a praecipe requesting said Clerk to include in the transcript of record to be prepared by him and sent by him to the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, in the appeal pending in said Court from this cause, certain additional matters a copy of which praecipe is hereby served upon you, as attorney for appellants, Roy G. Harris and Benjamin F. J. Odell.

September 29, 1937.

Sigmund W. David,
Attorney for Dahl-Stedman Co., et al., Appellee.

Received a copy of the above and foregoing notice, together with a copy of the praecipe referred to therein, this 29th day of September, A. D. 1937.

(Signed) Kenart M. Rahn,
Per E. P. G.,
Attorney for said appellant, Roy G. Harris and Benjamin F. J. Odell.

216 And on, to wit, the 25th day of September, 1937, came Roy G. Harris, et al., by their attorneys and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit:

217 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Sept. 2 1937.

• • (Caption—65890) • •

PRAECIPE.

To: The Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division.

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals, for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record, the following, to wit:

1. Bankruptcy petition filed May 3, 1937.
2. Motion, May 18, 1937, to quash alleged service of process and return thereon and to vacate all orders heretofore entered.
3. Leave to Avery Brundage Company, et al., on May 24, 1937, to file instanter petition and rule on all parties to answer in three days and set for hearing May 27, 1937.
4. Petition of Avery Brundage Company, et al., filed May 24, 1937.
5. Answer of petitioning creditors to Avery Brundage Company, et al. filed May 26, 1937.
6. Order of May 27, 1937 in re payment of certain funds and extension of time to file answers etc.

218 7. Order of May 27, 1937 vacating order of May 18, 1937 and referring cause to Referee Sullivan.

8. Special answer of Benjamin F. J. Odell, filed June 3, 1937, to petition of Avery Brundage Company, et al.
9. Petition of Roy G. Harris, filed June 3, 1937.
10. Petition of Tax Service Association of Illinois, filed June 3, 1937.
11. Petition, filed June 29, 1937, of Dahl-Stedman Company, et al.
12. Leave, granted June 29, 1937, Dahl-Stedman Company, et al., to file petition and special answers to stand and reference to Referee Sullivan.
13. Order of June 29, 1937, approving Referee Sullivan's report on notice to quash etc. and exceptions by bankrupt to order approving Referee's report and leave to file amended answer in three days and cause referred to Referee.

14. Amended answer of Tax Service Association of Illinois, filed July 2, 1937.

15. Report of Referee Sullivan in re petition of Dahl-Stedman Company, et al., etc. filed July 7, 1937.

16. Report of Referee Sullivan concerning reference of cause, filed July 8, 1937.

17. Rule, July 9, 1937, on Odell and Harris to file exceptions to Referee's report in two days and cause set for hearing July 12, 1937.

18. Motion of Harris and Odell, July 12, 1937, for extension of time in which to file exceptions to report of Referee and denial thereof and exceptions.

19. Joint exceptions of Harris and Odell to Referee's report filed July 12, 1937.

219 20. Order, July 12, 1937, of denial to Harris and Odell to file second amended and supplemental answer to petition of Dahl-Stedman, et al.

21. Order, July 12, 1937, overruling exceptions to Master's (Referee's) report and approval of report and exceptions.

22. Order, July 13, 1937, striking special answer of Benjamin F. J. Odell and petitions of R. G. Harris and Tax Service Association to strike petition of Avery Brundage Company, et al. etc.

23. Order of July 23, 1937, reserving exception to order of July 13, 1937, to answer Avery Brundage Company et al., petition on the merits.

24. Petition for Appeal and Severance.

25. Order allowing Appeal and Severance. (denied)

30. Notice of filing Praecipe.

31. This Praecipe for transcript of record and service thereof.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit and to be filed in the office of the Clerk of the said Circuit Court of Appeals for the Seventh Circuit, at Chicago, Illinois, within the time required by law and the rules of said Court.

Kenart M. Rahn,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

September 21, 1937

220 Service of the above Praecipe accepted and acknowledged this 21st day of September, 1937.

Sigmund W. David,
Attorneys for Appellees.

221 And on, to wit, the 29th day of September, 1937, came the Appellees by their attorney and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit: Filed Sept. 29, 1937.

222 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

APPELLEES' PRAECIPE.

To: The Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division.

You are hereby requested to include in the transcript of record to be filed in the United States Circuit Court of Appeals, for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, the additional matters following, to-wit:

1. Motion of petitioning creditors filed May 26, 1937, to strike special appearance of bankrupt and to dismiss bankrupt's motion to quash.

2. Answer of National Builders Bank of Chicago filed May 27, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

3. Answer of E. M. Craig filed May 27, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

4. Answer of William L. O'Connell, Jr., as Receiver of the Tax Service Association, filed June 8, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

223

5. Master's report on motion of alleged bankrupt to quash service, etc. filed June 23, 1937.

6. Petition of Dahl-Stedman Co., et al. for rule on Odell and Harris to show cause why they should not be held in contempt, filed July 21, 1937.

7. Order on Odell and Harris to show cause, entered July 21, 1937.

8. Joint motion of Odell and Harris filed July 30, 1937, to dismiss petition and quash rule to show cause.

9. Petition of Odell and Harris for leave to appeal and for a supersedeas, filed July 30, 1937, in the United States District Court.

10. Special answer of Tax Service Association, Odell and Harris filed July 30, 1937, to petition of Avery Brundage Company, et al. on order of July 13, 1937, to answer to the merits.

11. Order of the United States District Court denying Odell and Harris leave to appeal and supersedeas, entered August 2, 1937.

12. Notice of filing this praecipe for additional matters in the transcript of record, served on attorney for appellants.

13. This praecipe for additional matters in the transcript of record, and service thereof.

Kindly include the above described additional matters in the transcript of record in the above entitled cause to be prepared by you as required by law and the rules of this Court and of the United States Circuit Court of Ap-
224 peals for the Seventh Circuit, and to be filed in the Office of the Clerk of said Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois, within the time required by law and the rules of said Court.

Sigmund W. David,
Attorney for Dahl-Stedman Co., et al., Appellees.

225 Northern District of Illinois } ss.
Eastern Division }

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipes filed in this Court in the cause entitled In Re Tax Service Association of Illinois, a corporation, Alleged Bankrupt, No. 65890, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this ____ day of October 16th, A. D. 1937.

Henry W. Freeman,
(Seal) *Clerk.*

And on, to wit: On the Eleventh day of August, 1937, the following Assignment of Errors was filed in the Office of the Clerk of the U. S. Circuit Court of Appeals, to wit: Filed Aug. 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In Re Tax Service Association of Illinois, Alleged Bankrupt.	In Bankruptcy No. 65890.

ASSIGNMENT OF ERRORS.

And now comes Roy G. Harris, and Benjamin F. J. Odell, Appellants in this cause, and make and file this their Assignment of Errors and say that in the record in said cause there is manifest error in this, namely:

1. The Court erred in assuming jurisdiction over funds and controversies not involved in the bankruptcy matter.
2. The Court erred in taking jurisdiction over funds specially agreed not to be within its jurisdiction pending the determination of other jurisdictional questions.
3. The Court erred in ordering payment of the funds involved until the question of the bankruptcy of the Alleged Bankrupt was first decided.
4. The Court erred in the entry of the orders of July 12, 1937 and July 13, 1937.
5. The Court erred in restricting the time, in violation of the rules of Court, for Harris and Odell to file exceptions to the Referee's report.
6. The Court erred in refusing extension of time to Harris and Odell to file exceptions.
7. The Court erred in confirming the Referee's report on the Dahl-Stedman Company, et al., petition.
8. The Court erred in denying Harris and Odell leave to answer to the merits of the petitions and in striking their special answers to the jurisdiction of the Court.
9. The Court erred in denying leave to Harris and Odell to file amended or supplemental answer to the petition of Dahl-Stedman Company, et al.
10. The Court erred in not striking the said petitions.
11. The Court erred in denying motion for immediate hear-

ing on the issue of the jurisdiction over the subject matter and as to the other issues raised by the petition in bankruptcy and amended answer of alleged bankrupt.

12. The Court erred in denying leave of Harris and Odell to appeal.

Wherefore these Appellants pray that the decrees and orders herein may be reversed and for such other and further relief as to the court may seem just and proper.

K. M. Rahn,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

August 10, 1937.

Sept. 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Saturday, September 11, 1937.

Before

Hon. Evan A. Evans, Circuit Judge,
Hon. William M. Sparks, Circuit Judge,
Hon. J. Earl Major, Circuit Judge.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt. Benjamin F. J. Odell, et al., *Petitioners.*	Petition for Leave to Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes Benj. F. J. Odell and Roy G. Harris and present a petition for leave to appeal from the orders of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered in this cause on July 12, 1937, and on July 13, 1937, and also present a petition for a supersedeas and a petition for severance of parties.

On consideration whereof, it is now here ordered that the said petition for leave to appeal be and the same is hereby granted, and an appeal is hereby allowed from said orders of said District Court entered on July 12, 1937, and on July 13, 1937. Bond for costs in the amount of $250.00 to be filed in 10 days.

It is further ordered that a supersedeas be and the same is

hereby granted in this cause on the filing of a bond in the sum of Sixty Thousand Dollars ($60,000.00).

It is further ordered that the petition for severance be and the same is hereby granted, and the parties are hereby severed in accordance with the prayer of the said petition.

United States of America, } ss.

The President of the United States, To Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Appellees, and Sigmund W. David, Their Counsel, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein Roy G. Harris and Benjamin F. J. Odell are appellants, and you are appellees, to show cause, if any there be, why the orders rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William M. Sparks, Judge of the United States Circuit Court of Appeals this Eleventh day of September, in the year of our Lord one thousand nine hundred and Thirty-seven.

William M. Sparks,
(United States Circuit Judge.)

On this 24th day of September, in the year of our Lord one thousand nine hundred and Thirty-seven, personally appeared Mary Ellen Burr before me, the subscriber, Ruth V. Willner and makes oath that she delivered a true copy of the within citation to Sigmund W. David, Counsel for Appellees.

Sworn to and subscribed the 24th day of September, A. D. 1937.

Ruth V. Willner,
(Seal) *Notary Public.*

(Endorsed) No. 6355 United States Circuit Court of Appeals Seventh Circuit In Re Tax Service Association of Illinois, Alleged Bankrupt. Citation. U. S. C. C. A. 7. Filed Sep 25 1937 Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 121, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the nineteenth day of November, 1937, upon which the following entitled cause was heard and determined:

In the Matter of: Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,

vs.

Avery Brundage Company, *et al.*, and
Dahl-Stedman Co., *et al.*,
Appellees,

No. 6355, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1938.

(Seal)

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the fifth day of October, 1937, of the October Term, in the year of our Lord one thousand nine hundred and thirty-seven, and of our Independence the one hundred and sixty-second.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the seventh day of October, 1937, the following further proceedings were had and entered of record to-wit:

Thursday, October 7, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Order entered by this Court in this cause on September 11, 1937, be and it is hereby modified by reducing the amount of the supersedeas bond to seventy-five hundred dollars.

And afterwards, to-wit: On the third day of November, 1937, there was filed in the office of the Clerk of this Court, a Supersedeas Bond, which said Bond is in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In Re
Tax Service Association of Illinois,
Alleged Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

SUPERSEDEAS BOND.

Know All Men by These Presents That we, Roy G. Harris and Benjamin F. J. Odell, as principle, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto Dahl-Stedman Co., *et al.* (Dahl-Stedman Co., *et al.* being all of the two hundred and seventy-eight (278) individuals, firms and corporations—except Avery Brundage Company—specified and named as petitioners in their petition filed May 24, 1937, in the case entitled "In re Tax Service Association of Illinois, Alleged Bankrupt", pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, and Numbered In Bankruptcy No. 65890), hereinafter called the "Obligees", in the full and just sum of Seventy-five Hundred Dollars ($7500) to be paid to the said Obligees, their attorneys, attorneys in fact, their respective executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 25th day of October, A. D. 1937.

Whereas lately as a session of the District Court of the United States, for the Northern District of Illinois, in a certain suit pending in said Court entitled "In Re Tax Service Association of Illinois, Alleged Bankrupt", and Numbered In Bankruptcy No. 65890, certain orders were entered therein on July 12, 1937, and July 13, 1937, in favor of the above spe-

cified Obligees and against Roy G. Harris and Benjamin F. J. Odell and others, and the said Roy G. Harris and Benjamin F. J. Odell having petitioned for and been allowed by the United States Circuit Court of Appeals for the Seventh Circuit an appeal to the said United States Circuit Court of Appeals from said orders of July 12, and July 13, 1937, of the said District Court of the United States to reverse the said orders of July 12 and July 13, 1937, and a citation having been issued directed to said Obligees citing them to be and appear at the United States Circuit Court of Appeals at Chicago within thirty (30) days from the date of said citation;

Now, the condition of the above obligation is such that, if the said Roy G. Harris and Benjamin F. J. Odell shall prosecute their said appeal to effect, and shall answer and pay to the said Obligees, their attorneys, attorneys in fact, respective executors, administrators or assigns, all damages, interest and costs that may be awarded against the said Roy G. Harris and Benjamin F. J. Odell, or either of them, and shall obey or comply with the orders of July 12 and July 13 1937, of the said District Court of the United States, if they fail to make good their plea, then this above obligation to be void; otherwise to remain in full force and virtue. Payment to Obligees of any payments due to Obligees under this bond shall be made by making payment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax.

Signed, Sealed and Delivered this 25th day of October, 1937.

Roy G. Harris (Seal)
Benjamin F. J. Odell (Seal)
United States Fidelity and
Guaranty Company,
By: Philip E. Horgan (Seal)
Attorney-in-Fact.

Endorsed: Filed November 3, 1937. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the third day of November, 1937, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 3, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Halls, *et al.*,
vs.
Avery Brundage Company, *et al.*

6355

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the supersedeas bond of appellant filed this day in this cause be and the same is hereby approved.

And afterwards, to-wit: On the ninth day of March, 1938, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6355. October Term—1937—January Session—1938.

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, *et al.*, and DAHL-STEFMAN CO., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

March 9, 1938.

Before EVANS, SPARKS and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from orders of the District Court, in a bankruptcy proceeding, directing that certain funds be turned over to appellees. The latter are contractors, members of various trade associations, and on April 9, 1935, through such associations, entered into an agreement with the Tax Service Association of Illinois, the alleged bankrupt, by which the latter agreed to act for the members of such associations in litigating the question of whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to contractors. The alleged bankrupt, in accordance with said agreement, was paid $1500 in advance and was to receive an additional compensation not to exceed $20,000 if the Supreme Court of Illinois decided the Sales Tax question favorable to appellees. The alleged bankrupt agreed to retain Benjamin F. J. Odell, one of the appellants,

to act for and on behalf of appellees, but without expense to them, and it, in conjunction with Odell, was to have control of the procedure to be followed in making the monthly tax returns as was provided by the Sales Tax Act, including the escrowing or depositing of the same. The agreement was signed on behalf of the alleged bankrupt by appellant, Harris, its Vice President; and Odell, in writing, consented to his employment according to the terms of the agreement. Shortly after the execution of said agreement, appellants, Odell and Harris, together with E. M. Craig, directed a letter to the National Builders Bank of Chicago, calling the bank's attention to the opening of an account in the said bank entitled Sales Tax Escrow Fund. The letter specifically stated that these three persons had no interest in the funds, but that the same were under their custody and control pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois, and the letter also contained directions that the funds were to be paid out only on checks signed by the persons whose signatures appeared on the letter. Odell conducted negotiations with the State Finance Department and also instituted a suit in the Circuit Court of Cook County for the purpose of obtaining a construction of the Act which would exempt appellees from the payment of the tax. He was not successful in the Circuit Court and appealed the matter to the Supreme Court of the State, where he was also unsuccessful. In the meantime, appellees made their monthly tax returns to the alleged bankrupt, which kept records showing the amounts paid by each and which sums were deposited in the escrow fund.

On May 3, 1937, an involuntary petition in bankruptcy was filed against the Tax Service Association of Illinois, but for some reason which we are unable to ascertain from the record, an adjudication has not been made. At such time there was in the escrow fund $297,000 and on May 24, 1937, appellees, by a sworn petition, intervened in the bankruptcy proceeding, alleging that said money belonged to them and requested that it be returned. At that time the books and records of the bankrupt, as well as the tax returns and duplicates made by appellees, were in the possession of appellants, who appellees claim were merely acting as the agents of the bankrupt.

On May 26, 1937, an agreed order was entered, returning to appellees 75% of the money in the escrow fund. The order recited that all the interested parties, including appel-

lants, appeared in open court and agreed that the court had jurisdiction and consented to its entry. The order, among other things, decreed that the balance of the money in the escrow fund was $72,758.75 and the same should remain and be held in said escrow fund in the National Builders Bank of Chicago, subject to the further order of the court. In said order appellants were given until June 3rd to file their answer or other pleadings to appellees' petition, at which time an answer was filed alleging the court to be without jurisdiction to determine any rights relating to the escrow fund.

In the meantime it had been ascertained of the $72,758.75 in the escrow fund, $68,580.40 belonged to appellees. It seems that Odell had represented certain other clients whose sales tax money had been deposited in the fund, which accounts for the discrepancy in the amount stated. The receiver of the bankrupt, by answer, claimed that by reason of the agreement of April 9, 1935, he was entitled to $20,000 of this fund. June 29, 1937, appellees filed a petition asking that $48,580.40 be turned over to them, leaving $20,000 in the fund, about which there might be a dispute. Appellants again objected solely upon the grounds that the court was without jurisdiction to determine to whom the fund belonged. The court determined it had jurisdiction, both of the parties and the res. While appellants contend they have never been given an opportunity to answer the petition as to its merits and have never had a hearing upon the same, the order of the court entered June 29, 1937, recites: "The court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition," and further recites that they desire to stand upon the jurisdictional question theretofore raised. The petition and the answer raising the jurisdictional question were referred to a referee, who, on July 7, 1937, made his report. The referee recommended that appellees' request be allowed, and that the sum of $48,580.40 be paid to the appellees, which, by the terms of the report left $20,000 in the escrow fund. The court allowed appellants two days to file exceptions thereto, which it is claimed was in violation of a rule by which they were entitled to ten days. Nevertheless, such exceptions were filed and overruled by the court in its order of July 12, 1937.

Upon motion of appellants, another order was entered by

the court on July 13th, which among other things, directed appellants within 20 days to file their respective answer as to any claim or interest they might have in the remaining $20,000 of the escrow fund. So far as the record discloses, no such answer has ever been filed. The orders of July 12th and July 13th are appealed from.

The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs. It is claimed they were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction. It seems to us, even though it has been finally determined the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund. If we be wrong in this view, however, the agreed order of May 27, 1937, expressly conferred jurisdiction. Here all the parties, including appellants, were in court, and all agreed that court should assume jurisdiction of the controverted fund and make disbursement of the same. It would seem the court, at that time, might have been somewhat dubious of the situation as each party in interest, either personally or by attorney, was required to and did approve said order in writing.

It is insisted, however, by appellants, that jurisdiction can not be conferred by consent. Many cases are cited in support of this contention, but we think they are distinguishable from the situation here. As was said in *Page* v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27, on page 33:

"So far as concerns jurisdiction over property, the

actual or constructive possession, after the filing of the bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or by the bankrupt or his agents, or by someone not claiming beneficial interest (as, for example, custodians and court officers holding under nullified liens by legal proceedings, etc.) constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property,' and the property comes into its '*custodia legis*,' if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy, or of the trustee, marshal, referee, bankrupt, bankrupt's agent, or of someone not claiming beneficial interest, such as custodians or court officers under nullified liens by legal proceedings. In *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 29 S. Ct. 154, 156, 53 L. Ed. 327, the court says: 'But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state.' "

Every litigant, of course, is entitled to an opportunity to be heard upon the merits of a suit to which he may be a party or interested. Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have asserted such claim. It can not be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer as to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record they could have no interest or claim for services rendered in connection with the litigation in the matter of the sales tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without cost to appellees. While the record is confusing in some respects, we are satisfied the court had jurisdiction and that appellants had ample oppor-

tunity to assert any claim which they might have had to the fund in question.

The orders complained of are

AFFIRMED.

Endorsed: Filed March 9, 1938. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the ninth day of March, 1938, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 9, 1938.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this Court that the Orders or Decrees of the said District Court in this cause appealed from be, and the same are hereby affirmed with costs.

And afterwards, to-wit: On the twenty-third day of March, 1938, there was filed in the Office of the Clerk of this Court, a Petition that Mandate provide for payment of Costs, Interest and Damages, which said Petition is in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES THAT THE MANDATE OF THIS COURT PROVIDE THAT APPELLANTS ODELL AND HARRIS PAY APPELLEES COSTS, INTERESTS AND DAMAGES.

To the Honorable Judges of the United States Circuit Court of Appeals:

On March 9, 1938, this Court filed its decision affirming the orders of the District Court appealed from. The order of July 12, 1937, appealed from ordered appellants Odell and Harris to sign a joint check on the Sales Tax Escrow Fund at the National Builders Bank of Chicago for Forty-eight Thousand and Five Hundred Eighty Dollars and Forty Cents ($48,580.40) and deliver it to appellees.

After the petition of appellants for leave to appeal was allowed by this Court, this Court denied appellants' motion to excuse them from filing a supersedeas bond, and directed

that appellants filed a supersedeas bond in the sum of Seventy-five Hundred Dollars ($7500) with good surety. This Court also refused to accept the form of supersedeas bond submitted by appellants, and directed appellants to file the form of supersedeas bond submitted by appellees, which appellants did. The supersedeas bond provides, in part:

> "Now, the condition of the above obligation is such that, if the said Roy G. Harris and Benjamin F. J. Odell shall prosecute their said appeal to effect, and shall answer and pay to the said Obligees, their attorney, attorneys in fact, respective executors, administrators or assigns, all damages, interest and costs that may be awarded against the said Roy G. Harris and Benjamin F. J. Odell, or either of them, and shall obey and comply with the orders of July 12, and July 13, 1937, of the said District Court of the United States, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue. Payment to Obligees of any payment due to Obligees under this bond shall be made by making payment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax."

Rule 12 of the rules of this Court provides:

> "Supersedeas and cost bonds must be taken with good and sufficient sureties that appellant will diligently prosecute his appeal to effect and answer all damages and costs if he fail to make his appeal good."

It appears in the record in this case that the Sales Tax Escrow Fund is on deposit in the National Builders Bank of Chicago and is drawing no interest. By reason of the appeal in this case, appellees will have been deprived of the use of their Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until Odell and Harris comply with the order of July 12, 1937. As a matter of right, appellees are, therefore, entitled to an order in the mandate of this Court that appellants pay appellees (but not out of the Sales Tax Escrow Fund, which belongs to appellees and not to appellants) appellees' costs in this Court and interest at the rate of five per cent (5%) on Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until the date that Odell and Harris comply with and fulfill the order of the District Court of July 12, 1937. Interest is a proper charge under a supersedeas bond where the supersedeas delays the payment of a

fund to the party finally determined to be the owner of it. Substantially the same situation was presented in the case of

Brame v. *Keystone Credit Corporation*, 76 F. (2d) 328 (C. C. A. 4th Cir. 1935).

In that case an order was entered that a certain fund in the hands of a receiver be paid to appellees. The appellants tied up the fund by an attachment, and, having lost in the court below, delayed distribution by securing a supersedeas on appeal. The court said, in part, page 331:

> "Where the supersedeas delays the payment of a fund to the party finally determined to be the owner of it, it is difficult to see why the interest, at the legal rate that would have been earned during the time of the delay, brought about by the appeal and supersedeas, is not properly recoverable. * * * The appeal might have been prosecuted without a supersedeas, but it was elected not to do so, and a bond was given conditioned to save the appellees and cross-appellants harmless from any damages they might suffer incident to the appeal. Having elected to take this course, it is only just that those responsible for the delay in the payment to the lawful owners of the funds should respond in damages in a sum equal to the amount of the loss brought about by the course pursued. As an element of damages, interest is a proper item to be included."

Rule 26 of the rules of this Court provides:

> "1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.
>
> "2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.
>
> "3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court."

This Court is familiar with the record in this case and, therefore, no extended discussion is necessary at this time to show to this Court that the appeal in this case appears

to have been sued out merely for the purpose of delay. This is, therefore, a most proper case for the award to appellees of damages of ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), in addition to interest, to be paid to appellees by appellants.

As was pointed out in appellees' brief, appellants had no possible interest in the Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) they were ordered to turn over to appellees, and there was no reason for their refusing to comply with the order of July 12, 1937, except to harass appellees and prevent them from getting the money which belonged to them so that appellees would be inclined to pay something to appellants to which appellants were not entitled. If there ever was an appeal in this Court which was prosecuted for the purpose of delay and which did delay the proceedings of the lower court, this is the case. It is, therefore, respectfully submitted that paragraph 2 of Rule 26 should be applied and that the mandate of this Court, in addition to affirming the orders of the District Court of July 12, and July 13, 1937, should provide that appellants pay to appellees, out of their own money, interest and costs as hereinabove requested, plus damages in an amount equal to ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40).

Rule 26 is similar to the rule in other United States Courts of Appeals and in the Supreme Court of the United States, and has been frequently applied in cases similar to the instant case.

In

Hughes on Federal Practice, Jurisdiction & Procedure, Vol. 8, page 112,

the author says:

> "Parties should not be subjected to delay without reasonable cause, and the power of the courts to compensate for unwarranted delay, through the award of damages, ought not to be overlooked. It is exercised in proper cases, to discourage or prevent frivolous appeals taken merely to gain time.
>
> * * *
>
> "Judgments have been affirmed with ten per centum damages in many cases, where the defendants have prosecuted proceedings for a review for the purpose of delay."

In

Chicago Bonding & Surety Co. v. *United States, for Use of Frank Adams Electric Co., et al.*, 261 F. 266 (C. C. A. 7th Cir.),

this Court said, page 269:

"We have treated the case thus fully in order to justify our conviction that a clear case, with no defense, has been obstructed in order to delay payment. * * * Taxable costs cannot be made to reimburse the claimants for the expenses for briefs and oral arguments on appeal. Paragraph 3 of rule 28 (235 Fed. xii, 148 C. C. A. xii) should be applied.

"The decree is affirmed, with interest and costs, and with damages in the sum of 10 per cent. of the face of the claims."

In

Wagner Electric Manufacturing Co. v. *Lyndon*, 262 U. S. 226, 67 L. Ed. 961,

the plaintiff, Lyndon, recovered a judgment of Twelve Thousand Dollars ($12,000) against the defendant, Wagner Co., in the Circuit Court of Missouri. The judgment was affirmed by the Supreme Court of Missouri. The defendant, Wagner Co., then paid the amount of the judgment to the Sheriff, and the Wagner Co. thereupon filed a bill for an injunction against Lyndon and the Sheriff in the District Court of the United States, to enjoin the Sheriff from paying the money to Lyndon and Lyndon from receiving it. The bill was dismissed, Wagner Co. appealed, and the Circuit Court of Appeals affirmed the decree of the District Court. Wagner Co. then brought the case to the Supreme Court of the United States. The court, by Mr. Chief Justice Taft, said, page 964:

"We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the Federal jurisdiction and the successive appeals have been prosecuted solely for delay. Have we power to impose damages in this case?

"Section 1010 of the Revised Statutes (Comp. Stat. Sec. 1671, 6 Fed. Stat. Anno. 2d ed. p. 228) provides as follows:

" 'Section 1010. Where upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just

damages for his delay and single or double costs at its discretion.'

"Section 1012 has the effect to make section 1010 applicable to appeals in equity. The second paragraph of the 23d Rule of this court provides that

"'In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out for delay, damages at a rate not exceeding 10 per cent in addition to interests shall be awarded upon the amount of the judgment.'

"The third paragraph is:

"'The same rule shall be applied to decrees for the payment of money in cases in equity unless otherwise ordered by this court.'

"An objection to allowing damages in the present case suggesting itself is that the decree appealed from was not a money judgment. It is true that this whole litigation in the Federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23d Rule. Sections 1010 and 1012, Revised Statutes, are, however, not so restrictive, and they give this court power to impose just damages upon the affirmance of any judgment or decree, for delay. *Gibbs* v. *Dickman*, 131 U. S. clxxxvi. and 26 L. ed. 177, appx.

"The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. *Deming* v. *Carlisle Packing Co.* 226 U. S. 102, 109, 57 L. ed. 140, 144, 33 Sup. Ct. Rep. 80.

"We think that damages of $1,500 for delay are not excessive in this case. We therefore direct the dismissal of the appeal, with damages of $1,500, and the taxation of costs as upon an affirmance of the decree of the District Court."

In

Robertson v. *Wilkinson*, 10 F. (2d) 311 (C. C. A. 5th Cir.),

the court said on page 312:

"The conclusion is irresistible that this appeal was taken for purposes of delay only. The Revised Statutes authorize the assessment of just damages for delay—on writ of error in common-law actions by section 1010

(Comp. St. 1671) and on appeal in equity cases by section 1012 (1673). Rule XXX of this court authorizes damages for delay at a rate not exceeding 10 per cent. upon the amount of the judgment.

"Under the circumstances, in our opinion the full amount of damages authorized ought to be assessed."

To the same effect see

Deming v. *Carlisle Packing Co.*, 226 U. S. 102.

Appellees have actually suffered damages, by reason of this appeal, at least equal to the said ten per cent (10%) of the Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) that appellants were ordered to turn over to appellees by the District Court order of July 12, 1937. Without going into detail, the following are some of the proceedings that were necessary in this Court:

(a) Studying petition and brief of Odell and Harris for leave to appeal, and examining law.

(b) Preparation of answer of appellees to appellants' petition for leave to appeal, and brief in support of answer.

(c) Study of appellants' reply to appellees' answer.

(d) Study of petitions of appellants for leave to appeal without supersedeas bond.

(e) Preparation of appellees' answer to appellants' petitions for leave to appeal without supersedeas bond.

(f) Conferences with Clerk of the District Court in regard to the transcript of the record.

(g) Preparation of objections to form of supersedeas bond proposed to be filed by appellants, and drawing and submitting new form of bond, with suggestions in support thereof.

(h) Study of printed transcript of record.

(i) Studying brief of appellants.

(j) Preparation of brief of appellees.

(k) Studying appellants' reply brief.

(l) Preparation for oral argument, and making oral argument.

Appellees have not only been deprived of interest on their money, but have also been deprived of the use of their money for their needs in their businesses and the payment of taxes. Appellees have also, by reason of appellants' appeal, which was essentially frivolous and prosecuted solely for the purpose of delay, been compelled to have their attorneys perform extensive services. If this Court orders Odell and Harris to pay appellees their costs and interest on the Forty-

eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), plus damages of ten per cent (10%) of said sum, the amount realized by appellees and paid to them by appellants will be merely compensation to appellees for the damages they have suffered by reason of this appeal prosecuted solely for the purposes of delay.

It is, therefore, respectfully submitted that this Court include in its mandate that appellants Odell and Harris and the surety on their supersedeas bond pay to appellees, out of their own moneys and not out of the Sales Tax Escrow Fund, appellees' costs, interest at the rate of five per cent (5%) per annum on Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until compliance by Odell and Harris with the order of the District Court of July 12, 1937, and, in addition thereto, damages of ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) amounting to Four Thousand Eight Hundred Fifty-eight Dollars ($4,858); and that payment to appellees of said sums shall be made by appellants making payment thereof to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, as is specifically provided in the supersedeas bond filed in this cause.

Respectfully submitted,
Dahl-Stedman Co., *et al.*,
Appellees,
By George V. Dahl,
Henry P. Reger and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax,
By Geo. V. Dahl.

Sigmund W. David,
Attorney for Appellees.

State of Illinois }
County of Cook } ss.

George V. Dahl, being first duly sworn, on oath deposes and says that he is President of Dahl-Stedman Co., one of the appellees; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the appellees as a Special Committee on Illinois Retailers' Occupation Tax, and authorized to act on behalf of appellees; that he is one of the duly authorized agents and representatives of all of the appellees, and makes this affidavit on behalf of all of said appellees. Affiant further says that he has read the above petition and knows the contents thereof; and that the matters and things therein stated are true to the best of his knowledge and belief.

Geo. V. Dahl.

Subscribed and sworn to before me this 23rd day of March, A. D. 1938.

(Seal)

Nathan Chertkow,
Notary Public.

Endorsed: Filed March 23, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-ninth day of March, 1938, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing is in the words and figures following, to-wit:

No. 6355

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1937—JANUARY SESSION, 1938.

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,

Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Appellants.

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION FOR REHEARING.

KENART M. RAHN,

Counsel for Appellants.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

U. S. C. C. A. 7
FILED
MAR 29 1938



IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1937—JANUARY SESSION, 1938.

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,

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ROY G. HARRIS and BENJAMIN F. J. ODELL

Appellants,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Your petitioners, appellants in the above entitled cause, present this their petition for rehearing and respectfully submit to the court that after careful reading of the opinion filed in said cause they are forced to conclude that certain material facts in this proceeding have been overlooked or misapprehended by the court. The law bearing upon certain issues in the case has been misconstrued; distinctions have been misapprehended, and certain vital and material points necessary to a

correct decision have been inadvertently omitted from consideration.

The Court has failed to appreciate, whether with or without an answer, there was no disposition of the case below on the merits and therefore findings here of various facts are unwarranted. There has been no hearing on the Avery Brundage Petition, no hearing on answers of Craig, the Receiver, the Bank, or Petitioning Creditors concerning the $72,000, yet this court has made findings of fact which could only be determined after a hearing on those answers. The Court overlooked the fact that neither Appellants nor Appellees were parties to the bankruptcy proceeding. The Court overlooked the abuse of discretion of the trial court in entertaining the collateral proceedings prior to adjudication. The Court overlooked errors as set forth in exceptions to Master's report.

Jurisdiction.

This court has on pages four and five of its opinion, depended upon the case of *Page* v. *Arkansas National Gas Corporation* in 53 Fed. (2d) 27, 33, to support its conclusion that jurisdiction of the court was conferred in the case at bar, by consent of the parties. We believe what follows will convince this court that the Page case is confusing and does not correctly state the law applicable to the instant case.

An appeal was taken in the Page case to the United States Supreme Court on the question of the jurisdiction of the court (286 U. S. 269; 52 Sup. Ct. 507; 76 L. Ed. 1096). In affirming the decision of the District Court in the Page case, the Supreme Court based its affirmance on the specific language of the

Bankruptcy Act, Par. 23B. The Supreme Court said (286 U. S. 269, 270):

> The Receiver (later the trustee) in the bankruptcy proceeding there had gone into possession of the leasehold, claiming it as property of the bankrupt. The Court then continues on page 271:
>
> "The right asserted before the referee by the trustee in bankruptcy to compel a conveyance to the bankrupt of property adversely claimed, is one which may be asserted by the trustee in a plenary suit. By Par. 23 (a) of the Bankruptcy Act and Par. 291 of the Judicial Code, District Courts of the United States, which by Par. 1 (8) of the Bankruptcy Act are courts of bankruptcy, are given jurisdiction of all controversies in law or equity between trustees and adverse claimants concerning the property claimed by the trustee. And by Par. 23 (b), 'suits by the trustee, shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. * * *' For reasons stated at length in the opinion in *Macdonald* v. *Plymouth County Trust Co.*, decided this day, ante, p. 263, we hold that the referee is a court within the meaning of Par. 23 (b) and that, respondent's predecessor having consented to litigate the issues presented by the petition and answer before the referee, the latter had jurisdiction to decide the issues presented."

It is apparent that the Supreme Court in arriving at its conclusion that there was jurisdiction in the bankruptcy court relied wholly upon the language of the statute giving the bankruptcy court jurisdiction in *suits by trustees*. The case at bar is clearly distinguishable. There has been no adjudication, and no trustee has been appointed. No trustee or receiver has gone into possession, taken or claimed the property in dispute.

There is also a vast distinction otherwise between the facts in the Page case and the case at bar. The Page case did not involve a suit between two third parties but it involved a controversy between a trustee and a third party. The third party in the Page case did not raise the question of jurisdiction. There the trustee had actual custody of the property in question. In the case at bar there is no trustee and the receiver is claiming no interest whatsoever in the Forty-eight Thousand ($48,000) Dollars and the court has not actual or any possession of that fund.

Paragraph 23 of the Bankruptcy Act specifically gives a court of bankruptcy jurisdiction in a suit by a trustee provided defendant consents thereto. In the case at bar, had there been an adjudication and a trustee appointed, jurisdiction might conceivably have been conferred by consent of the parties. However, the act does not so apply to a receiver, and there was no trustee in our case.

This court has on numerous occasions defined the power of a bankruptcy receiver prior to adjudication, as a mere caretaker. His authority is strictly limited by the Bankruptcy Act and should not, and can not, be extended by construction.

It seems if Congress had intended to vest the bankruptcy court with jurisdiction to settle disputes between receivers and third parties upon mere consent, it would have said so. In the case at bar dispute is not even between receiver and third parties but between third parties and third parties.

In the Page case there is cited to support its theory, *Murphy* v. *John Hofman Company*, 211 U. S. 562, but the court does not fully quote the language there.

The language in that decision states that where

property in dispute is in **actual possession of the court of bankruptcy** there comes into play another principal not peculiar to courts of bankruptcy but applicable to all courts, Federal or State.

> "* * * Where a court of competent jurisdiction has taken property into its possession, **through its officers**, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. * * *" (Page 569.)

Where property is in the actual possession of the court, the court of course has jurisdiction over that particular property, other courts can not take jurisdiction for want of such actual possession. In the case at bar, there is no dispute between different courts as there was in the Murphy case. This Murphy case is merely authority that possession of property by a bankruptcy court can not be disturbed by the process of another court.

May we respectfully request this court to again read the Nixon case (38 Fed. (2d) 420, 423), cited by appellants, which covers the facts in case at bar and holds jurisdiction can not be conferred by consent of the parties. This case is extensively cited on the points involved here by many of the Circuits and text books.

The property in dispute in the case at bar was not in the actual possession of the court of bankruptcy

as it was in the Murphy case. The funds were not deposited in the court, the receiver did not have or claim possession of the funds in dispute, no trustee for the court had possession of the funds, the referee did not have the funds in his possession, the marshal of the court did not have them in his possession but they were held by three separate individuals as Escrowees; Craig swore in his answer that he was not agent for the bankrupt; Harris and Odell, the other two escrowees, maintain they were not agents for the bankrupt. The bank, in its answer, reserved the right to object to any disbursement of funds except as provided for in the letter of authority (Rec. 46-7). Can it be contended that the court had in this bankruptcy matter any possession or right to these funds which were in escrow for the State and the appellees pending the outcome of the litigation? The appellees in their petition set forth that the alleged bankrupt was in no way interested in these Forty-eight Thousand Dollars of funds. Certainly the record reveals that the possession is hostile and adverse to the court, at least as far as the contesting parties, Harris, Odell and the Bank are concerned.

If the court had possession of the funds, why did it not order the bank to pay them irrespective of Craig, Harris and Odell, the escrowees? Of course the court could not do this and did not do this because it did not have possession of the funds.

The Court misconstrued the law and the facts in intimating that the funds were in the possession of the bankruptcy court. In order to be *custodia legis,* the rule is well settled, property must be in the possession of an officer of the court or must be deposited in court.

Possession becomes material only when there is a dispute between a trustee and an adverse claimant, over the *estate of the bankrupt*. The Bankruptcy Act grants jurisdiction as follows:

> "(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise provided." U. S. Code, Title XI, Chap. II, Sec. XI.

Clearly the jurisdiction relates to estates of bankrupts, and jurisdiction to determine controversies must relate to the *estates of the bankrupt*.

This section has two requirements: First the controversy must relate to the estate, and second, there must be a bankrupt—*i. e.*, there must be an adjudication. In the case at bar, neither element was present. The controversy does not relate to the estate of the bankrupt, because the $48,500.00 is not and never has been claimed by the bankrupt, or the receiver. Second there was no bankrupt—there had been no adjudication.

In any event there is no possession of the fund in controversy in the bankruptcy court. This fact can not be disputed. The funds are in the National Builder Bank,—not in court. The bank has filed what might be termed a special and limited answer (Rec. 46) reserving rights to object to any distribution of funds other than by the agreement of deposit. The alleged bankrupt does not have them in its possession. The court's officers do not have possession of them.

The court no doubt inadvertently overlooked the answer filed by William L. O'Connell, the receiver, on June third, after the so-called agreed order which reads in part as follows:

> "Wherefore, this respondent prays that an order may be entered herein, restraining and en-

joining the petitioners, and each of them, their attorneys and agents, the National Builders Bank of Chicago, its employees, agents, and attorneys, Benjamin F. J. Odell, R. G. Harris, Ruth V. Wilner, P. M. Weaver, E. M. Craig, and R. D. Steel, or any of them, from paying out, disbursing, or otherwise disposing of the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) of said moneys now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, until an adjudication of the alleged Bankrupt is had in this proceedings, or until the further order of this court." (Rec. 53.)

There has been no hearing whatever upon this answer. If the Court had possession of any of the funds, it would have been unnecessary for the receiver to ask for a restraining order. Clearly the Court's own officer did not consider that he had any control or custody of the funds. It should be noted that the only relief asked for by the receiver was a restraint upon the disbursing, not of the $72,000.00, but only of the $20,000.00.

The courts have often held that a receiver can not maintain a summary proceeding for the recovery of property. A receiver may protect his possession of property until there is an adjudication, but he can not maintain suits.

The court has completely overlooked the fact that at the time of the entry of the orders appealed from, there had been no adjudication of the Tax Service Association as a bankrupt.

One of the defenses raised by the answer of the alleged bankrupt was that the court was utterly without jurisdiction over the subject matter of the entire bankruptcy proceeding, because the Tax Service Association was not a "moneyed, business or commercial

corporation" within the purview of the bankruptcy act. If this defense be sustained the entire proceeding including the controversy relating to the Escrow fund must in law be considered a nullity.

The court overlooked the fact that the bankruptcy petition might be dismissed. In such a case the controversy will have to be litigated twice, involving double expense, costs and delay.

Appellants Were Not Agents of Bankrupt.

This court concludes that while the record does not show it, the circumstances warrant the contention that appellants were agents of the alleged bankrupt. This court has undoubtedly overlooked some very pertinent facts in this respect. Odell was engaged by the appellees themselves, the contractors. The contract between the Tax Service Association and the several trade associations was not the contract of engagement of Odell by the appellees. Appellees were not parties to that contract.

As an attorney, Odell's obligation was to his clients, the contractors, for whom he instituted the suit. He did not institute a suit for the alleged bankrupt; he did not institute a suit for the trade associations with whom the alleged bankrupt contracted. His relations as an attorney were distinctly with his clients, the contractors, appellees here. Indeed, as an attorney, his obligation could not be to anyone else than his clients. It would have been inconsistent, if not impossible, for him to have had an agency with anyone else than his clients for whom he was conducting the litigation. The very word "attorney" means agent. Appellees' petition itself says Odell was notified by appellees to cease acting as their agent (Rec. 31-32).

This definitely establishes the agency of Odell for his clients, appellees, and for no one else.

The escrow fund was definitely in control of three parties, none of whom were the alleged bankrupt. The escrow fund was not opened under the direction of the alleged bankrupt as this court has assumed. None of the alleged bankrupt's officers or agents could disburse the funds. Indeed, the letter (Rec. 27) to the bank concerning the funds dispels any theory of agency control or possession by the alleged bankrupt. This escrow, like other escrows, was established for protection. In this case to protect the State of Illinois, pending the outcome of the litigation.

Appellants' Right to Answer Not Waived.

On page 3 of its opinion this court states:

> "• • • While appellants contend they have never been given an opportunity to answer the petition as to its merits and have never had a hearing upon the same, the order of the court entered June 29, 1937, recites: 'The court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition,' and further recites that they desire to stand upon the jurisdictional question theretofore raised. • • •"

It is respectfully drawn to this court's attention that it has long been the established law and custom of the courts to first determine jurisdictional questions. Appellants, unless they desired to waive their jurisdictional contentions, could not at the same time answer to the merits. In that respect did the trial court have authority to order appellants to answer the petition as to its merits? The court actually never

ordered the appellants to answer to the merits. This matter is dealt with in appellants' brief (page 25), wherein it is pointed out that the order with this erroneous language was surreptitiously presented by Attorney David in the absence of other counsel. The error in that order and the misconstruction given it were pointed out to the court by appellants in their exceptions to the Master's report (Rec. 92). Where an alleged waiver of the right to answer is disputed should not the answer be permitted, particularly where the alleged waiver is secreted in a blind order? We believe it is the duty of all courts when error is revealed to give defendants all possible latitude in answering, that equity and justice may be further promoted.

This court may have overlooked that the appeal in this case was from an order overruling appellants' exceptions to the referee's report (Rec. 98). Apparently this court has not ruled on that part of our appeal.

This court has overlooked the fact that the trial court arbitrarily denied appellants' request duly made for leave to answer to the merits (Rec. 96). Exception was duly taken thereto and an appeal prayed thereon.

In this court's statement of facts no reference whatever is made to that order appealed from, and which is as follows:

> "This day comes Benjamin F. J. Odell and Roy G. Harris by their attorneys and enter their motion for leave to file second amended supplemental answer to the petition of Dahl-Stedman, *et al., which motion is denied,* to which ruling of the court Benjamin F. J. Odell and Roy G. Harris *duly except.*" (Rec. 96.)

In its opinion (page 5) this court further states:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have asserted such claim."

After the motion to strike of Roy G. Harris and special answer of Benjamin F. J. Odell to strike were decided against them on the sole question of jurisdiction, appellants did make strenuous efforts to assert their claims by answer to the merits, but the court denied them that right and the ruling was duly excepted to.

The situation with respect to the Dahl-Stedman petition was this:

June 29	Dahl-Stedman petition filed.
June 29	Motion to strike of Harris and Special Answer of Benjamin F. J. Odell referred to Referee Sullivan on jurisdictional question.
July 12	Motion for leave to answer to merits denied.
July 12	Order entered on merits of Dahl-Stedman petition approving Referee's report.

The Court misconstrued the so-called "Special Answer of Odell" (Rec. 54). The prayer of that answer asked "that the petition heretofore filed be stricken". The legal effect was simply a motion to dismiss. The petitions of Harris and Tax Service Association to strike the Avery Brundage petition (Rec. 55-56) were also motions to strike and did not purport to be answers.

Appellants have a right by statute and rules of court to move to dismiss a petition prior to filing any answer.

> "* * * If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, *and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered.*"
>
> Rule 29 for Courts of Equity of the United States.

Here the court denied the appellants the right to file an answer after motions to strike were overruled.

This appeal is from the order denying leave to file an answer.

Appellants now stand before this court asking leave to be heard on the merits. Denial of such leave means not only a deprivation to appellants of their day in court, but it opens the way for an extensive personal liability to them in paying $48,000 otherwise than in the manner contracted and deprives them of their common law, statutory and constitutional rights.

This court has seen fit to remark on page 4 of its opinion that on July 13th appellants were directed to answer, showing what interest or claim they had in the remaining $20,000 of the escrow fund; this court then continues, no such answer has been filed. Had appellants answered, appellees could well have contended the jurisdictional question was waived. Appellants were therefore compelled to be consistent and adhere to their jurisdictional complaint. Their answers, therefore, to the $20,000 were likewise to the jurisdiction of the court. The court has also overlooked the fact that an appeal was taken from this order and no answer was necessary in the lower court in the interim.

Appellants Have An Interest in the Funds.

Appellants heretofore have refrained from discussing their interest in the funds but this court has commented upon their failure to state that interest. Therefore, to clarify and remove any confusion it is submitted what the answer of appellants would have revealed had appellants been allowed to file it.

First. The answer would show appellant Odell has a lien on the funds for the payment of his attorney's fees for various contracts of engagement of his services. That appellees' petition merely reveals engage-

ment of appellant Odell, by the agreement of the associations and subsequent agreement by a few of the contractors (Rec. 25). That there were several forms of agreements engaging appellant Odell and he is entitled to have the court pass upon all of them, and not merely the forms appellees have chosen and submitted.

Second. The answer would show appellant Odell had served notice of attorney's lien whereby he is protected by law as to all interest he may have in the funds.

Third. The answer would show the contract between the Tax Service Association and the Employers Associations was not the contract under which appellant Odell litigated for the appellees.

Fourth. The answer would show appellant Odell is entitled to compensation on a *quantum meruit* or a *quantum valebat* for the services he rendered appellees.

Fifth. The answer would show a definite deception was practiced upon appellants to procure their signature to the order of May 27th.

Sixth. The answer would show appellees hired appellant Odell by written contract not shown in the record, independent of contract between trade associations and the alleged bankrupt, and he is entitled to the wage of his hire.

Seventh. The answer would show there was an acceptance of the services of appellant Odell and there was an express agreement to pay him.

Eighth. The answer of appellants will show that an injunction was issued by Judge Stanton of the Superior Court of Cook County in case No. 37 S 1716 enjoining appellants from disbursing the said funds in escrow and said injunction is still in force and effect.

That on May 12, 1937, a restraining order of the United States District Court in this case was entered in effect preventing the dissolution of the said injunction in the State court and it is still in full force and effect. That appellants would be violating said injunctions should they now disburse said funds.

Ninth. The answer would show no provision was made for indemnification to appellants for payment of funds otherwise than under their agreement to disburse them.

Tenth. That the answer would state facts to show that jurisdiction was not conferred on the court by consent of the parties.

Eleventh. That the answer would show it is believed the petitions were filed without authority of the alleged appellees and without knowledge of some of them.

Twelfth: That the answer would show that the tax litigation was eminently successful.

Successful Contractors' Suit.

This court has said in its opinion that appellant Odell was unsuccessful in the contractors' suit in the Illinois Supreme Court.

The court failed to notice that the sworn answer of the receiver for the alleged bankrupt (Rec. 51) sets forth the success of appellant Odell in the Blome case. No hearing has been had on the answer of the Receiver. The court also overlooked denial to appellants of right to answer on the merits. (Rec. 96.) No answer or hearing on the merits has been allowed these appellants, yet this court has erroneously decided that the appellant Odell was unsuccessful in the contractors' litigation.

The court's attention is drawn to just what happened in that case in the Illinois courts so there will be no confusion on those facts. At the time appellant Odell was engaged by the contractors to intercede for them with the Department of Finance that Department was erroneously construing the Retailers' Occupation Tax Act by their ruling that contractors should pay the tax on both their labor and materials unless the contractors complied with arbitrary requirements commercially impracticable if not impossible. After the Department's refusal to change this ruling Odell was then engaged to file suit for the contractors. The Circuit Court of Cook County by decree also upheld that rule. The Supreme Court of Illinois in February, 1937, on appeal, held that the tax could not be computed against the contractor on both labor and material used in building and construction, and that the Department of Finance could compute the tax only on the price of materials furnished. The Supreme Court of Illinois thereby reversed the decree of the Circuit Court of Cook County and upheld appellant Odell's contention and remanded the cause for further proceeding:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> Reversed and remanded."

Blome v. *Ames*, 365 Ill. 456.

The Department of Finance was accordingly compelled to change its contested rule. The sworn petition of

the receiver herein is correct therefore (Rec. 51), in the recitation of the facts that the decision was favorable to the contractors as a result of Odell's efforts.

Thus the contractors became exempt from tax on their labor, the major portion of construction costs.

The contractors, at the direction of their attorney, appellant Odell, pending the litigation had put in escrow only the estimated tax on materials (not on labor). There was no escrow made of taxes on labor. Had the contentions of the Department prevailed the contractors would have been liable for tax on labor as well as materials (the $314,000 in escrow and the additional tax not in escrow to be calculated on their labor. Perhaps an additional $600,000).

As to the tax on the materials (the $314,000 in escrow) the Department required payment of approximately only seventy-five per cent leaving a saving to the contractors of approximately twenty-five per cent of the tax on their materials in addition to unqualified exemption of tax on their labor.

In December, 1937 the Supreme Court of Illinois voluntarily, of its own accord, modified its prior limited decision in the said Blome case and held that material as well as labor was exempt from the tax. That court used these words:

> "• • • The *Blome case* involved 'contractors who agreed to furnish and install building materials and fixtures, to do excavating, make foundations erect buildings, and make various kinds of repairs to buildings already built.' It is directly in point here. We have reconsidered in this opinion the reasoning upon which part of that decision rests and no longer feel impelled to follow it. So far as that case applies to construction contractors who furnish labor and materials in excavating for basements, sewers, water mains or other purposes,

> or in the erection of foundations or buildings, or in the making of various kinds of structural repairs to buildings, the *Blome case* is expressly overruled."

This language is taken from the case of *Herlihy* v. *Nudelman*, 367 Ill. 600, 605, which was a public construction case for the Sanitary District and did not involve private construction. The Department of Finance accordingly then made a second revision of its rule, exempting contractors in all construction, private and public, from tax on materials (as well as labor). As it now stands every contractor, every plaintiff in the Blome case, is now entitled, as a result of appellant Odell's efforts, to the return of the seventy-five per cent paid by them to the State as a tax on materials as well as a refund from the State on all other sales taxes paid by them on materials. In addition to this, these plaintiffs, as contractors, are now and hereafter exempt from the tax. The said $314,000 therefore dwindles into insignificance in comparison to the gross savings by contractors which it is estimated will run into millions.

Therefore, the facts are that appellant Odell won a very substantial victory for the contractors or appellees here in procuring their exemption from the Retailers' Occupation Tax Act of the State of Illinois.

CONCLUSION.

This court in its opinion arrived at certain conclusions of fact which might be cited as *res. judicata.*

Does this court thereby decide that Appellant Odell is precluded from recovering sales tax litigation fees against some of the Appellees on separate contracts not in issue here, when Odell was denied right to answer?

Does this court intend by its opinion, without a court hearing, to determine that nothing is due to the alleged bankrupt?

Does this court intend by its opinion to prevent Appellant Odell from litigating in other courts his right to fees?

Does this court conclude that no one is obligated to pay legal expenses for the contractors' litigation?

It is urgently requested that a petition for rehearing be granted appellants herein to the end that the District Court may be held to have been without jurisdiction to entertain the petitions filed by Appellees; that Appellants may be held to have been erroneously deprived of their right to answer said petition on the merits, that the orders of the District Court be reversed and such other and further relief be granted as is consistent with equity and justice.

Respectfully submitted,

KENART M. RAHN,
Counsel for Appellants.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

I, Kenart M. Rahn, Counsel for the above named Appellants, do hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay.

KENART M. RAHN,
Counsel for Appellants.

Endorsed: Filed March 29, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of March, 1938, there was filed in the office of the Clerk of this Court, Suggestions in Opposition to Petition for allowance of Costs, Interest and Damages, which said Suggestions are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

SUGGESTIONS OF APPELLANTS IN OPPOSITION TO APPELLEES' PETITION FOR ALLOWANCE OF COSTS, INTEREST AND DAMAGES.

These respondents respectfully advise the court that they have filed a petition for rehearing of this cause within the time allowed by law and said petition is as yet undisposed of by this court.

The appeal in this case was filed in all sincerity, was not frivolous nor taken for delay. On August 11, 1937, Petition for Leave to Appeal was filed in this court. Appellees in opposition thereto contended the appeal was frivolous and prosecuted for delay. This court then upon consideration of respective briefs and points made therein concluded there was sufficient merit to warrant the appeal and it was accordingly

allowed September 11, 1937. The record in the case was promptly prepared and abstract and brief filed with due diligence. Within less than sixty days after the filing of briefs this court rendered its decision, notwithstanding the Seventh Circuit is burdened with fifty per cent more litigation than any of the other Circuits. Appellees can hardly be heard to complain they have suffered by any delay.

The case presented some unusual and heretofore undecided questions of law. Some of the questions raised were whether or not third disinterested parties can use a bankruptcy court to litigate their contentions; whether or not a bankruptcy court has power to dispose of property, not part of the bankruptcy estate, prior to adjudication; whether equity rule sixty-six and bankruptcy rule fourteen are binding upon the District Court itself as well as on the litigants therein; whether or not a litigant can be deprived of a right to answer to the merits because he has first raised a jurisdictional question,—all vital questions heretofore undecided in this Circuit.

The court itself has intimated in its opinion the case presented some troublesome and doubtful phases.

The appellants were, as escrow officers, trustees of the funds entrusted to their care. Their office was that of a fiduciary; their duties and liabilities were to all of the 368 depositors. Three of these claimed to represent a group of the depositors and made demands for moneys in the trust fund. As trustees it was and is the duty of appellants to have determined, First, the validity of the self-asserted claims of the three; Second, the amounts due to all the claimants including the State of Illinois.

Pending the determination of the amount due the State of Illinois, the said three depositors filed a petition in the bankruptcy court and thereby imposed upon the trustees, appellants, a positive duty to protect the trust estate. In the performance of that duty these appellants, trustees, engaged counsel to represent them as trustees of said funds. The funds then awaiting distribution (had the litigation not been so started by appellees) were not and had not been drawing interest for two years. There was no agreement to pay interest. Shortly after the litigation was started by appellees, on to-wit, July 12, 1937, appellants in open court, before his Honor Judge Phillip Sullivan, offered to put the money into Federal securities which would earn interest. Appellees did not concur therein. Again in this court on to-wit, October 13,

1937, appellants suggested, in their pleadings, that the funds be invested in Federal securities. Again appellees did not assent. Fiduciary funds do not by law draw interest. Appellants did not institute the litigation that is preventing the distribution of these funds. There was no necessity to file petition in the Bankruptcy Court, especially when the State Court already had jurisdiction of the entire matter.

The order appealed from directed appellants to sign a check to others than their fiduciary contract obligation required, and was not a money judgment. The order provided:

> "That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee * * *" (Rec. 98)

The order merely directed the signing of the check. It did not require appellants to pay any money. In such cases interest is not properly allowable. In case at bar the order was not to pay money but to do a physical act,—to sign a check to three persons who wanted to make distribution themselves of the funds.

Under neither the Illinois Statutes nor rules of this court is there provision for payment of interest on such orders or under such circumstances, to-wit, the performance of a physical act.

Appellants were and still are enjoined from distribution of the funds by order of Judge Stanton of the Superior Court of Cook County in case No. 37 S 1716. On May 12, 1937, a restraining order of the United States District Court in this case was entered in effect preventing the dissolution of the said injunction in the State court and that injunction is still in force and effect despite numerous attempts by the alleged bankrupt to dissolve the same.

By virtue of contracts of hire, not set out in the petition, appellant Odell has an attorney's lien upon the funds for services he has rendered appellees and for which services he has not been paid. An example of such contracts is as follows:

> "On the recommendation of The Builders Association, we hereby consent to the employment of Benj. F. J. Odell as our attorney to represent us in negotiations and litigation in an effort to change the present ruling of the Retailers' Occupation Tax Act as it applies to us, the expense in no event to exceed three months' savings of

such taxes, payment of our share of the expenses to be made with the approval of The Builders Association under their agreement with said Odell as to a gross maximum fee. The above is subject to Bulletins issued by Mr. Craig dated April 17th and 23rd, 1935.

Dahl-Stedman Co.
Geo. V. Dahl
(Seal) *As President*

Dahl-Stedman Co.
Elmore W. Stedman
As Sec'y & Treas.

April 25, 1935."

There are 368 contractors interested in the escrow fund. A substantial number thereof have relatively small sums due them ranging from ten cents to Fifty Dollars each. It appears that many may be financially irresponsible and perhaps not readily able to respond to payment of the compensation due from them to appellant Odell otherwise than out of said funds.

The action of the Special Committee has compelled the trustees in the due performance of their fiduciary relation to incur expenses in this litigation, through no fault of theirs and which expenses should be distributed proportionately to all the contractors and not be borne by a few or by the said trustees. It is the positive duty of a trustee to protect the trust estate. The trustees acted, and were required to act, for all of the contractors and not merely for those whom the committee claims to represent.

"As a general rule, the costs and expenses incurred by the trustee in necessary and proper litigation carried on by him as the representative of, and relative to, the trust, are payable out of the trust estate, and not by the trustee personally. Accordingly, a trustee who acts in good faith is entitled to have paid out of the trust estate costs and expenses incurred by him, in a proceeding by him to collect the assets and claims due the estate, including the foreclosure of mortgages; in a proceeding to obtain the advice and direction of the court; and in the defense of actions against the estate, and also costs and expenses on appeal, unless the appeal is unnecessary or not in the interests of the trust estate. In the light of this rule, judgments and orders imposing costs on trustees are held to charge them in their official, instead of

their individual capacity, unless a contrary intention appears. * * *"

65 Corpus Juris page 723-724, Sec. 586

"Ordinarily, where the litigation involves the protection and preservation of the whole trust estate, the costs and expenses incurred by the trustee in prosecuting or defending the litigation are chargeable to the capital or principal of the estate; * * *"

65 Corpus Juris page 727, Sec. 590

"* * * Perilous, indeed, would be the position of a trustee if the law required him to protect and guard the trust fund in expensive and long protracted litigation at his own expense, and, besides, to be held liable for every unavoidable loss from a decrease in value of the trust property, or otherwise."

Nevitt v. *Woodburn*, 190 Ill. 283, 298.

Attorneys fees, costs and other expenses of the trustees are proper charges against the fund and should be deducted before distribution.

The authorities submitted by appellees are inapplicable to this case.

In cases appellees cite the courts specifically found the appeals were frivolous. None of them involved discretionary appeals but involved appeals as a matter of right. All of them involved judgments or decrees for the payment of money. In case at bar execution could not issue and draw interest on a judgment. In none of appellees' cases was there conflicting orders of the courts, such as State Court injunction in case at bar. In none of appellees' cases were there offers to deposit the funds in court. In case at bar one appellant has an attorney's lien on the funds. Appellants should not be penalized for performing fiduciary duties imposed on them by law.

This case has not been appealed for delay; appellants have faithfully performed their duties; meritorious questions having been presented by the appeal; therefore, costs, interest and damages should not be assessed against appellants.

Respectfully submitted,

Roy G. Harris,
Benjamin F. J. Odell,
By Kenart M. Rahn,
Their Attorney.

Kenart M. Rahn,
Attorney for Appellants.

State of Illinois }
County of Cook } ss.

Kenart M. Rahn being first duly sworn on oath says that he is conversant with the above and foregoing answer, knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge and belief except those things on information and belief and as to them he believes it to be true.

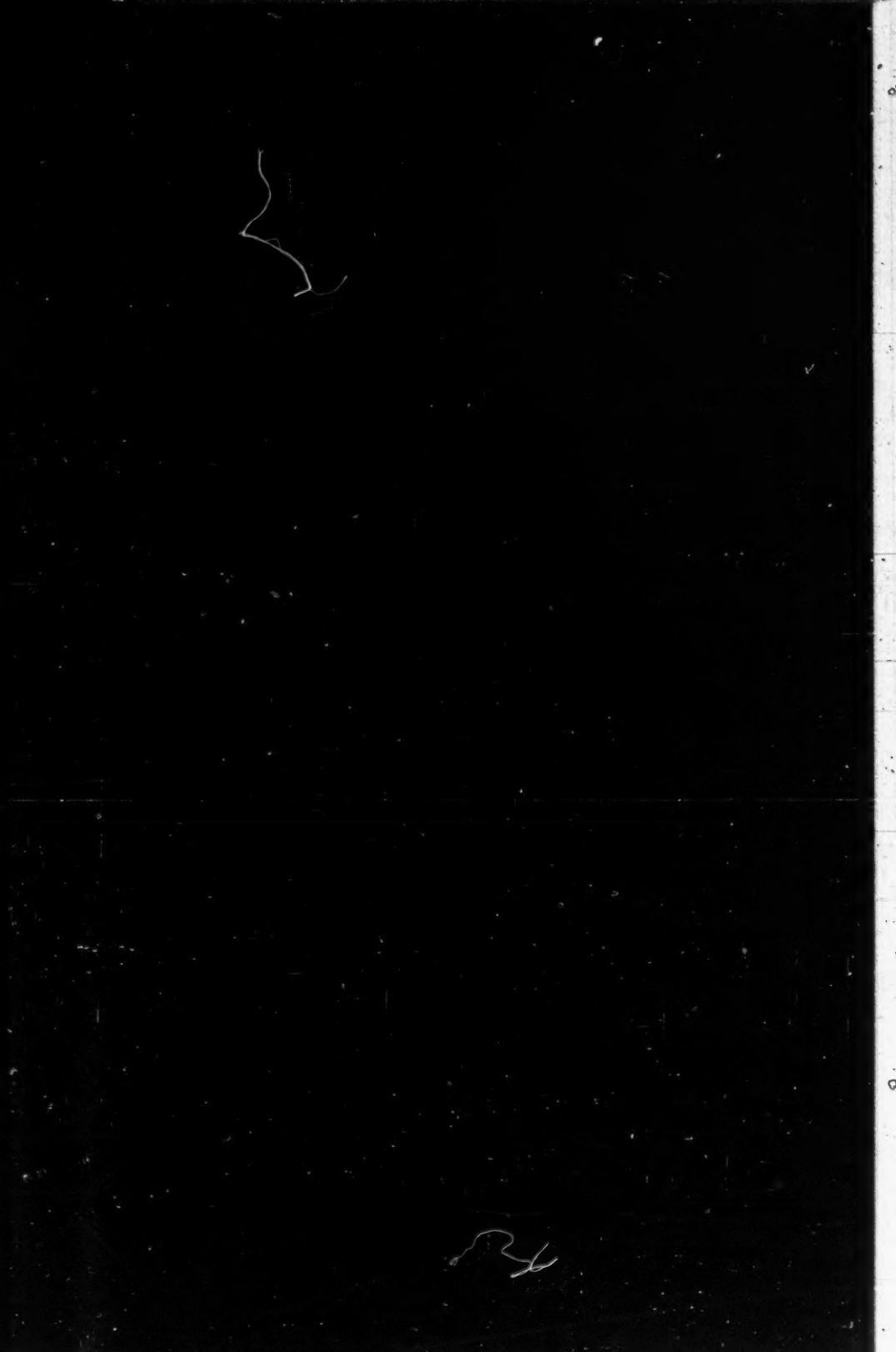
Kenart M. Rahn.

Subscribed and sworn to before me this 30th day of March, A. D. 1938.

Ruth V. Willner,
Notary Public.

Endorsed: Filed March 30, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifth day of April, 1938, there was filed in the office of the Clerk of this Court, Appellees Answer to Petition for Rehearing, which said Answer is in the words and figures following, to-wit:



IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 6355

In Re TAX SERVICE ASSOCIATION OF ILLINOIS, Alleged Bankrupt.	Appeal from certain orders of the District Court entered on petition of Dahl-Seedman Co., et al., petitioners-appellees, vs. Benj. F. J. Odell and Roy G. Harris, respondents-appellants. Hon. Phillip L. Sullivan, District Judge.

APPELLEES' ANSWER TO PETITION FOR REHEARING.

May it please the Court:

Appellants' petition for rehearing is merely a reargument of the issues thoroughly argued in the briefs and decided by this Court, together with a statement of new matter totally extraneous to the record.

Appellants say that this Court failed to appreciate that there was no disposition of the case below on the merits and, therefore, findings of various facts are unwarranted. Appellants' statement is refuted by the record. The order of May 27, 1937, made findings of fact which were agreed to by all the parties. The Court also made findings of fact in the order of July 12, 1937, after report of the

Special Master, and these findings were based upon the sworn averments of appellees which were not denied.

Appellants say (p. 2):

> "The Court overlooked the fact that neither Appellants nor Appellees were parties to the bankruptcy proceeding."

The inaccuracy of appellants' statement is easily determined. This Court did not overlook the question. It passed directly and squarely upon it, saying:

> "The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs."

Jurisdiction.

Appellants claim that this Court decided that the District Court had jurisdiction because of the consent of the parties; that in doing so this Court depended upon the case of *Page* v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27; and that said case is confusing.

The facts are to the contrary. This Court decided, in accordance with the law and the numerous cases cited under Point I of Brief for Appellees (p. 15), that the District Court had jurisdiction because a bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent. This Court said:

> "It seems to us, even though it has been finally determined that the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund."

This was the basis of this Court's decision. This Court then added:

> "If we be wrong in this view, however, the agreed order of May 27, 1937, expressly conferred jurisdiction."

However, there is nothing confusing about the *Page* case. In that case the Supreme Court rendered a short opinion and did not repeat all of the language of the Circuit Court of Appeals; but almost the identical language of the Circuit Court of Appeals in the *Page* case quoted in this Court's opinion in the instant case has been used by the U. S. Supreme Court and other courts in numerous cases. See quotation from

In re Kerr, 5 F. Supp. 899,

on page 23 of Appellees' Brief, and cases therein cited, including

Taubel-Scott Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Appellants' strange process of reasoning amounts to this: this Court's conclusion on the question of jurisdiction was incorrect because it quoted from the opinion of the Circuit Court of Appeals in the *Page* case and the Supreme Court affirmed the *Page* decision but used different language. Ergo? Appellants conveniently ignore all of the cases on jurisdiction and consent cited under Points I and II of Appellees' Brief.

Appellants intimate, although they do not directly say, that the fact that there had been no adjudication of the bankrupt deprived the Court of jurisdiction over the Escrow Fund. It is significant that they cite no case and have never cited one to sustain this intimation. We repeat, as we have said before, that the jurisdiction of the bankruptcy court over property in its possession is not determined or affected by whether there has or has not

been an adjudication of the bankrupt. If that were not the law, a court in bankruptcy before adjudication would have no right or jurisdiction to order property in the possession of the bankrupt or the bankrupt's agent turned over to the receiver, would have no right to order its receiver to take appropriate action to protect and collect the bankrupt's property, and would have no right to entertain a petition for reclamation by a third party who claims that its property is in the possession of the bankrupt or the bankrupt's agent, etc. All these things a bankruptcy court has the jurisdiction and right to do before adjudication of the bankrupt; and there is no case in the books which holds or intimates to the contrary.

In this connection, it may be of interest to this Court to know that on March 24, 1938, Referee William L. Sullivan, as Special Master, filed his report recommending that an order of adjudication be entered against the alleged bankrupt. In view of the fact that appellants in their petition for rehearing (p. 8) mention the defense of the alleged bankrupt to the petition in bankruptcy that it was not a "moneyed business or commercial corporation," it is interesting to note what the Special Master says concerning this defense. He says:

> "There can be little doubt, in my opinion, that the purpose of the organizers and managers of the Association (Tax Service Association) was at all times their own financial gain. One would have to be credulous, indeed, to believe that the object of those who organized this Association or who successively had the management of its affairs, or the taxpayers who joined it, was anything other than financial benefit to themselves. Certainly, there was nothing eleemosynary in or about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter."

Appellants having found a case which talks about actual possession of the Court, use a page of their petition to claim that the District Court in this case did not have actual possession. They use many words to make a straw man in order to knock him down. Suppose the Court did not have actual possession; in any event it had constructive possession, which was amply sufficient to give it jurisdiction to dispose of the Fund.

But, appellants say (p. 6):

> "The court misconstrued the law and the facts in intimating that the funds were in the possession of the bankruptcy court. In order to be in *custodia legis*, the rule is well settled, property must be in the possession of an officer of the court or must be deposited in court."

We submit that this statement is brazen effrontery. It charges this Court with a misconstruction of the law. Its sole proof of that charge is appellants' statement of the law which cites no case to support it and ignores all of the cases cited in Appellees' Brief under Point I (p. 15). The rule of law is, as stated in all those cases, that:

> "So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or by the *bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes *'custodia legis'* for the purpose of assumption of jurisdiction" by the bankruptcy court."

On page 7 of their petition for rehearing appellants also claim that a bankruptcy court has jurisdiction only over controversies relating to the property of a bankrupt and that there is no bankrupt until there is an adjudication. Both of appellants' assertions are clearly erroneous. In order to sustain the first, they quote one out of twenty grounds of jurisdiction specified in the stat-

ute, ignoring the other nineteen. If a bankruptcy court has jurisdiction only over property of the bankrupt, then it would have no jurisdiction to order property in the possession of a bankrupt or its receiver or trustee or agent returned to its owner. As we said before, no decision has held that a court of bankruptcy lacks jurisdiction over a controversy until after adjudication. To the contrary see:

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir., 1932) 59 F. (2d) 721.

In re J. C. Winship Co., (C. C. A. 7th Cir., 1903) 120 F. 93, 96.

Appellants say (p. 7) that this Court no doubt inadvertently overlooked the answer filed by the receiver, in which he asked for a restraining order on all the parties. Appellants say if the Court had possession of any of the funds it would have been unnecessary for the receiver to have asked for a restraining order. The receiver did ask for such an order as to $20,000, but no order was ever entered on his request. Is the receiver's request *proof* that the Court did not have possession of the fund? In fact, however, the receiver actually did claim that the Court had jurisdiction of the entire fund. He said in his answer (Tr. 50):

> "By reason of the filing of the petition herein by petitioners, that portion of said fund now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, which was furnished by petitioners, is subject to the jurisdiction and order of this Court."

The portion of the fund to which the receiver referred is $68,580.40, namely: the $48,580.40 in controversy in this appeal and the $20,000 which was reserved for future determination.

Appellants the Agents of the Bankrupt.

This Court said in its opinion:

> "It is claimed they (appellants) were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction."

In their petition for rehearing appellants endeavor to show, by making the identical arguments they made in their main and reply briefs, that this Court, in making the above statement, overlooked some pertinent facts. However, appellants now make one new point, namely:—that appellees were not parties to the contract of April 9, 1935.

This is, indeed, a surprising assertion. If it were true, then appellants and the Tax Service Association were all guilty of fraud. The contract of April 9, 1935, provides (Tr. 23) that the Tax Service Association agrees to expend its efforts to persuade the Department of Finance of Illinois to change its present rulings concerning the application of the Illinois Retailers' Occupation Tax Act to said subscribers, and to retain on behalf of the subscribers and for them, but without expense to them, Attorney Odell, and, in the event of a favorable ruling after proceedings have been instituted in the State Court holding said subscribers exempt from said tax, the Tax Service

Association was to receive an additional sum equivalent to the calculated net savings to each subscriber for 3 months preceding the saving, but not to exceed $20,000. Odell consented to retention under the terms of this agreement. It is apparent that the trade associations who signed the contract were acting for their members. The trade associations themselves (not being engaged in any business) were not subject to any Retailers' Occupation Tax. There could be no saving to them of any tax. Therefore, if what Odell and the bankrupt agreed to do, for which the bankrupt was paid $1500 and was to be paid a contingent fee of $20,000, was to have declared exempt from the tax the trade associations which had never been considered subject to the tax, Odell, Harris and the bankrupt were guilty of plain, unadulterated fraud.

It is elementary law that a person for whose benefit a contract is made may be a party thereto. Appellants' contention (now made for the first time) that the contract of April 9th was not a contract between appellees and the bankrupt, but one between the trade associations and the bankrupt is so far-fetched that it serves well to emphasize and confirm appellees' contention that appellants' appeal here is frivolous and was taken purely for the purposes of delay, and that, therefore, (as appellees have prayed in their petition filed March 23, 1938) appellants should pay appellees interest, costs and 10% damages.

Appellants' Right to Answer.

Appellants in this part of their petition simply reargue what was argued in their main and reply briefs. For reply to their arguments we refer to Appellees' Brief. Appellants refuse to learn by experience. They are still willing to reiterate (p. 11) that an order was

obtained surreptitiously by appellees' counsel, although the record is bare of anything to support their claim except their own unsupported assertion, and although their assertion is so flagrantly improper that this Court in its opinion did not deem it worthy of notice.

Appellants' last paragraph on this point shows their real position. They insistently and loudly complain that they were deprived of their "rights" concerning the $48,580.40 because the court did not permit them to plead to the merits. Appellees' brief showed that appellants were not deprived of any rights and that their claim that they wanted to plead to the merits and were not allowed to do so is a pure subterfuge. This Court has pointed out in its opinion that appellants were directed to plead to the merits as to the $20,000 and did not do so. They now say they did not plead to the merits because they wanted to insist upon the question of jurisdiction. If, as they say, they didn't want to plead to the merits as to the $20,000, then upon what theory did they want to plead to the merits as to the $48,580.40? Of course, they also ignore the fact that the question of jurisdiction had been decided in the previous order of May 27th, from which no appeal was taken.

Appellants Have No Interest in the Fund.

Appellants have no regard for the rule that decisions of courts of appeal are based upon a record, and not upon unsworn and unsupported statements of the lawyer for the appellants. To contradict the statement of this Court that it appears from the record that appellants have no interest in the $48,580.40, appellants, ignoring the record, state at great length "what the answer of appellants would have revealed had appellants been allowed to file it".

They were directed to file an answer to the $20,000 but they refused to answer and disclose their interest in that $20,000. Now for the first time they are willing to reveal it. Had they actually desired to show the trial court that they had an interest in the Escrow Fund they could have presented an answer setting up that interest, and asked leave to file it. Had the Court refused to permit them to file it, the answer nevertheless would have been made a part of the transcript of record and would have been before this Court on this appeal.

As appellants' unsupported assertions concerning the contents of their hypothetical answer have no reference or relevancy to the record before this Court, they are impossible to answer, and they require no answer. However, a few remarks concerning them may be of interest to the Court.

Assuming, for discussion, the truth of everything they claim, their claims themselves show that they have no lien upon or interest in the $48,580.40 of the Escrow Fund. They say that Odell rendered services to some of the appellees under different agreements than the contract of April 9, 1935, and, therefore, he has a lien on the Escrow Fund. Has he? The Court will remember that on the oral argument of this case appellants' counsel, Mr. Rahn, made a similar statement; that thereupon Judge Major asked Mr. Rahn whether any such agreement, other than the contract of April 9th, was in the record; that Mr. Rahn said it was; that Judge Major asked him to locate it in the record; that he was unable to do so; that Judge Major then asked Mr. David whether there was any agreement in the record other than that of April 9th, and Mr. David answered that there was but that such agreement showed just the contrary to what appellants claimed it showed; and Mr. David then read to

the Court that part of appellees' original petition referring to such an agreement, which appears on Tr. 25, Rec. 42.

But, assuming, for discussion, that Odell actually did have other contracts with some of the appellees by which they agreed to pay him reasonable fees for his services, or assuming that he is entitled to recover against some of the appellees on a *quantum meruit*, has he therefore a lien upon or interest in the Sales Tax Escrow Fund? Upon no legal theory has he any such interest or lien. Appellants say in their suggestions in opposition to appellees' petition for costs, interest and damages (p. 2):

> "The appellants were, as escrow officers, trustees of the funds entrusted to their care. Their office was that of a fiduciary; their duties and liabilities were to all of the 368 depositors."

They say on page 10 of their petition for rehearing:

> "This escrow, like other escrows, was established for protection. In this case to protect the State of Illinois pending the outcome of the litigation."

Now, if Odell and Harris are holding, as trustees, a Fund belonging to over 300 contractors, under no legal theory has Odell a lien on or interest in the Fund merely because he has a claim for legal services against some of the owners of that Fund.

Neither by statute nor common law has a lawyer a lien on or interest in a trust of which he is one of the trustees merely because one or some of the beneficiaries of the trust owe him money for legal services. The Illinois Attorneys' Lien Statute merely gives a lien to an attorney on a money judgment or decree obtained by means of legal services performed by the attorney pursuant to contract with his client. There was no money judgment or decree obtained by Odell for any of the appellees. But, even if there had been, Odell is not claim-

ing a lien on or interest in a judgment or decree, but in a trust fund of which he is one of three trustees and of which there are over 300 beneficiaries. His claim is without basis or merit. See

Lewis v. *Canadian Pacific Railway Co., et al.* (C. C. A. 7th Cir. 1930), 39 F. (2d) 834,

which opinion cites numerous cases, including

Cameron v. *Boeger*, 200 Ill. 84,

and

Story v. *Hull*, 143 Ill. 506.

The above would dispose, if the matter were actually before this Court (which it is not) of paragraphs 1 to 4, inclusive, 6 and 7 of appellants' hypothetical answer.

It is worthy of comment that it now appears more clearly than ever that appellants have no appealable interest. The only interest they claim (predicated upon statements not a matter of record) is a claim of Odell's for an alleged lien on the Fund because of legal services rendered; and it is clear that as a matter of law no such lien exists.

Incidentally, Odell says he served notice of attorney's lien. If he did, the appellees never heard of it.

Appellants say that Point 5 of their hypothetical answer would show a definite deception was practiced upon them to procure their signature to the order of May 27th. In other words, appellants, one of whom is a lawyer, signed the order, agreed to it in open Court, drew a check for $242,200 pursuant to the order, and then discovered 10 months later that their signatures had been procured by fraud.

Point 8 of their hypothetical answer, appellants say, would aver that an injunction was issued by Judge Stanton enjoining the distribution of this Fund, and that on

May 12, 1937, a restraining order in this cause was entered preventing the dissolution of the said State Court injunction; that said injunction is in full force and they would be violating it should they now disburse the Fund. If they did make this averment in their hypothetical answer, it would not be true. There is no such injunction in existence. (Appellants mysteriously cite the case in which said injunction was entered without naming it. However, we found the case, and unqualifiedly assert that there is no such injunction now in existence in such case.) Even the record before this Court proves that there is not. If such injunction existed, why, on May 27th, did appellants not bring it to the attention of the Court? Why were appellants willing to, and why did they deliberately, violate it by distributing $242,200 of the Fund? If it existed, why did the parties who obtained the restraining order in this Court consent to the orders here appealed from? If it existed, why have appellants just discovered its existence (although they say they were the persons enjoined) some 10 months late?

Appellants say that in Point 10 of their hypothetical answer they would state facts to show that jurisdiction was not conferred on the District Court by consent of the parties. If there were facts of such nature, then, as we pointed out in our original brief, it was not only the right, but the duty, of appellants to state those facts in their special answers claiming that the court had no jurisdiction. Their special answers averred no facts.

Point 11 of said hypothetical answer would show, say appellants, that "it is believed that the petitions were filed without authority of the alleged appellees and without knowledge of some of them." The "belief" of appellants is hardly sufficient to refute appellees' sworn petition and the authority of appellees' counsel to represent them.

Point 12 of appellants' hypothetical answer would show, they say, that the tax litigation was eminently successful. What would that have to do with the question of the Court's jurisdiction in this case? If it was successful within the meaning of the agreement of April 9, 1937, there is still reserved in the bank $20,000 to be paid upon order of the District Court to those persons entitled to it. And the maximum to be paid under the agreement of April 9th was $20,000.

Successful (???) Contractors' Suit.

Appellees' original petition alleged the facts concerning the contractors' suit, and the consent order of May 27th could not have been agreed to by the parties or entered by the Court if the facts so alleged in appellees' petition had not been conceded to be true by all concerned. *The contractors' suit was decided against the contractors.*

A reading of the opinion in

Blome Co., et al. v. *Ames, et al.*, 365 Ill. 456,

is all that is necessary to determine that fact. But, even if the contractors had won that case, appellants would have had no interest in the $48,580.40 which they refuse to release. Appellants were not to get anything out of the Escrow Fund if the suit was successful. The alleged bankrupt, and it only, was to get $20,000 if the contractors were held to be exempt from the sales tax. $20,000 was reserved by the Court in its order of July 12th, subject to all claims and rights of all persons in and to said $20,000. (Tr. 98, 99) However, it should be noted that the contract concerning the $20,000 shows clearly that the alleged bankrupt was to get the $20,000 "in the event of a favorable ruling after proceedings have been in-

stitutes in the State Court *holding said subscribers (the contractors) exempt from said tax.*" (Tr. 23) The Supreme Court, in the *Blome* case, said:

> "It is the contention of appellants (the contractors) that they do not come within the Act. • • • The *Bradley Supply Co.* case, *supra,* is conclusive as to the point now urged."

In the

Bradley Supply Co. case, 359 Ill. 162,

the Supreme Court had held that *supply dealers* were exempt from the tax and that *contractors* were *not* exempt from the tax.

Yet, appellants go to great length in their petition for rehearing to prove, by statements and assertions totally without basis in the record, that Odell was successful in the contractors' suit. We know of no word to describe appellants' claims about Odell's alleged success except "fantastic."

Pursuant to the agreed order of May 27, 1937, in this case, there was paid to the Illinois Department of Finance out of the Escrow Fund of $314,885.96 (supposed to cover all of the sales taxes of the contractors in the Escrow for the period covered by the Escrow), on account of sales taxes of said contractors, $242,200 or 75% of the total amount plus interest of 3%. Appellants' logic apparently is this: the Tax Service Association was to endeavor, by litigation on behalf of the contractors, to have the Courts declare the contractors *exempt* from the sales tax. The Tax Service Association retained Mr. Odell to handle the litigation. He did so. The contractors deposited $315,000 in escrow to protect the State of Illinois in case the contractors were held subject to the tax. After the suit was decided they paid to the State, *on account,* $242,200 out of the $314,885.96

This proves that the contractors were held to be exempt from the tax and that Mr. Odell was successful in the prosecution of the litigation.

But the balance of appellants' argument is even more fantastic. It runs about as follows: Appellees and Odell and Harris agreed that appellees were in no event liable for a sales tax on the labor appellees furnished. Therefore, appellees put in the Escrow Fund an amount representing the sales tax only on the materials furnished. The suit was instituted to have the appellees held exempt from *any* sales tax. The Supreme Court held that appellees were *not* exempt from the tax and were liable for a tax on the materials they furnished. Therefore appellees were held exempt from the tax, Odell was successful in the lawsuit and appellees gained great sums of money.

Actually, the fact is that the Illinois Retailers' Occupation Tax Act never taxed contractors on their labor. The law taxes gross receipts from the sale of tangible personal property only. The Supreme Court did hold in the *Blome* case that the Director of Finance could not compel the contractors to follow his prescribed method of billing, and that minor point was the only one in the *Blome* case decided favorably to the contractors. Appellants well know that their statement that the Director of Finance required payment of approximately only 75% of the tax on materials, leaving a saving of 25% to the contractors, is not true and that the payment of 75% was a payment on account only.

But we have not yet reached the apex of appellants' fantastic argument. It is as follows: In December, 1937, 10 months after the *Blome* case was decided, the Supreme Court held in the *Herlihy* case that building contractors were not liable for taxes on the materials they

furnished. The appellants had nothing to do with the *Herlihy* case either as parties or attorneys. But, (according to appellants' logic), the Supreme Court of Illinois, having in the *Herlihy* case overruled the *Blome* case which Odell lost for the appellees, this proves that Mr. Odell was successful in his litigation in the *Blome* case and won a substantial victory there for appellees "in procuring their exemption from the Retailers' Occupation Tax Act of the State of Illinois."

Conclusion.

Appellees respectfully submit that appellants' petition for rehearing should be denied. Appellees further submit that the character of appellants' petition for rehearing is confirmation of the fact that appellants' appeal was frivolous and has been pursued solely for the purpose of delay. On March 23, 1938, appellees filed in this cause a petition that the mandate of this Court provide that appellants Odell and Harris pay appellees costs and interest and also damages of 10% because the appeal was frivolous and pursued for the purpose of delay. Appellees respectfully submit that the prayer of their petition should be allowed. It is, therefore, respectfully submitted that the petition for rehearing should be denied, the orders appealed from affirmed, and that the mandate of this Court should provide that appellants and their surety on their supersedeas bond pay to appellees appellees' costs, interest on $48,580.40 from July 12, 1937, and damages of 10% of $48,580.40, in accordance with Rule 26 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Steadman Co., et al., Petitioners-Appellees.

And afterwards, to-wit: On the sixth day of April, 1938, there was filed in the office of the Clerk of this Court, Corrections of Misstatements in Answer to Petition for Rehearing and Suggestions Re; Costs and Damages, which said Corrections are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

CORRECTIONS OF MISSTATEMENTS BY APPELLEES IN BOTH THEIR ANSWER TO PETITION FOR REHEARING AND ANSWER TO APPELLEES SUGGESTONS RE INTEREST AND DAMAGES.

To the Honorable Judges of the United States Circuit Court of Appeals:

On page 13 of their printed answer and on page 3 of their typewritten answer appellees have said:

"There is no such injunction in existence."

Appellants stated in their briefs there was such an injunction. Without going into the many misstatements appellees have made, we desire to correct at least this one.

On March 6, 1937, before Judge Walter T. Stanton, the following took place:

"State of Illinois, } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

National Bureau of Property Administration, Inc., a corp.,
vs.
Tax Service Association of Illinois, a corporation. } No. 37 S 1716.

ORDER.

This cause coming on to be heard on the sworn petition of the Receiver, Sylvester O'Donohue and no notice being required by the Court, and the Court having heard testimony and argument of counsel.

It is Ordered, Adjudged and Decreed that R. G. Harris and Benjamin O'Dell deliver to the Receiver Sylvester O'Donohue forthwith, all records, accounts and contracts in connection with certain Sales Tax Exemption cases which the Tax Service Association of Illinois has contracted to service for the following groups, Associations, and corporations:

1. Contractors Sales Tax Fund. * * *

Further that all the said persons and banks be and are hereby restrained from making any transfer, withdrawal or removal of any money in said accounts until further order of court.

March 6, 1937.

Enter:

Walter T. Stanton,
Judge."

It is true, as appellees have said, that the Appellate Court of the State of Illinois, did reverse the decision of Judge Stanton appointing a receiver for the Tax Service Association. However, upon the presentation of the mandate of the Appellate Court to Judge Stanton and application to him to dissolve the injunction and vacate the orders entered therein, there was there and then presented in open court before Judge Stanton an injunction issued May 12, 1937 by Judge Phillip L. Sullivan of the United States District Court restraining appellants from further proceeding in either the

said Superior Court case No. 37 S 1716 or the said Appellate Court case No. 39507. Thus the Superior Court injunction could not be dissolved.

The District Court's injunction is as follows:

"In the District Court of the United States

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Tax Service Association of Illinois, a corporation, Alleged Bankrupt. } No. 65890.

ORDER.

At Chicago, Illinois, this 12th day of May, A. D. 1937.

This cause coming on to be heard upon the motion of National Bureau of Property Administration, Inc., a corporation, one of the petitioning creditors in the above entitled matter, and it appearing to the Court that the alleged bankrupt, Tax Service Association of Illinois, its agents and attorneys, and its officers and directors, Roy C. Harris, George P. Clayson, Mildred P. Voight, Ralph A. Simmons and Clarence Meyer, their agents and attorneys, have been and are now prosecuting or attempting to prosecute certain purported rights, remedies or causes of action which, if they in fact exist, are rightfully vested in and are the property of William L. O'Connell, Jr., the duly appointed and qualified Receiver in this cause, and are about to institute and prosecute other purported rights, remedies or causes of action which, if they in fact exist, are vested in and are the property of the said Receiver herein, and the Court being fully advised in the premises:

It Is Hereby Ordered that the alleged bankrupt, to-wit: Tax Service Association of Illinois, its agents and attorneys, and the officers and directors of the said alleged bankrupt, to-wit: Roy G. Harris, George P. Clayson, Mildred P. Voight, Ralph A. Simmons and Clarence Meyer, their agents and attorneys, be and they are each

of them hereby restrained and enjoined of and from in any manner further proceeding in that certain cause now pending in the Superior Court of Cook County, case No. 37 S 1716, and of and from in any manner further proceeding in that certain cause now pending in the Appellate Court of Illinois, First District, First Division, case No. 39507, and of and from in any manner further appearing in any of the above said causes, and that they and each of them be and they are hereby restrained and enjoined of and from instituting or prosecuting any suit, claim or cause of action of any kind or nature, whether in law or in equity, based upon any subject matter involving or pertaining to, directly or indirectly, Tax Service Association of Illinois, the alleged bankrupt, until the further order of this Court,

Enter:

Philip L. Sullivan,
Judge."

Both of these injunctions are still in full force and effect.

It is true that $242,200.00 of the fund was disbursed to the State of Illinois upon solicitation of Judge Sullivan and on order before him but that order so disbursing it was with the consent and approval of the attorneys who procured the injunction in the Receivership in the Superior Court, from Judge Stanton.

Appellants, therefore, as related in their petition for rehearing, were enjoined from signing the checks.

Respectfully submitted,
Roy C. Harris,
Benjamin F. J. Odell,
By Kenart M. Rahn,
Attorney for Appellants.

Kenart M. Rahn,
Attorney for Appellants.

State of Illinois, }
County of Cook. } ss.

Kenart M. Rahn, being first duly sworn, on oath, says that he is conversant with the above and foregoing "corrections of appellees misstatements", that he knows the contents

thereof and that the matters and things therein stated are true in substance and in fact:

Kenart M. Rahn.

Subscribed and sworn to before me this 6th day of April, 1938.

Ruth V. Willner,
Notary Public.

Endorsed: Filed April 6, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eleventh day of April, 1938, the following further proceedings were had and entered of record, to-wit:

Monday, April 11, 1938.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.

In the Matter of
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris, *et al.*,
6355 *vs.*
Avery Brundage, *et al*,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be and the same is hereby denied.

It is further ordered that the costs of this suit be taxed against the appellants.

It is further ordered that appellants pay to the appellees interest on $48,580.40, at the rate of 5% per annum, from July 12, 1937, until said $48,580.40 is paid.

It is further ordered that the petition for allowance of ten per cent damages in addition thereto be and the same is hereby denied.

And afterwards, to-wit: On the fourteenth day of April, 1938, the following further proceedings were had and entered of record, to-wit:

Thursday, April 14, 1938.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

In the Matter of
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris, *et al.*,
6355 *vs.*
Avery Brundage, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellants, It is ordered that the Mandate in this cause be and the same is hereby stayed until the further order of this court, and that counsel for appellants promptly file a Petition for a Writ of Certiorari in the Supreme Court of the United States and forthwith file proof of the filing of said Petition in this Court.

And afterwards, to-wit: On the twenty-fifth day of April, 1938, there was filed in the office of the Clerk of this Court, a Notice and Praecipe for Supreme Court Record, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of
Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*,
and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To: Sigmund W. David,
38 S. Dearborn Street
Chicago, Illinois,
Attorney for Appellees,
Dahl-Stedman Company, *et al.*

Please be advised that on or before Monday the 25th day of April, 1938, I shall file with the Clerk of the court a praecipe for a transcript of the record pursuant to a Petition for Certiorari to be shortly filed in the Supreme Court of the United States, in the above entitled cause, a copy of which praecipe is herewith served upon you.

Kenart M. Rahn,
Attorney for Appellants.

Received a copy of above mentioned praecipe this 25th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

No. 6355.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PRAECIPE.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a Petition for Certiorari which will shortly be filed by appellants Roy G. Harris and Benjamin F. J. Odell with the Clerk of the Supreme Court of the United States, and to include in such transcript of record, the following, to wit:

1. Order reducing supersedeas bond to $7500.00 entered on October 7, 1937.
2. Supersedeas bond of appellants Roy G. Harris and Benjamin F. J. Odell.
3. Order of November 3, 1937 approving supersedeas bond.
4. Opinion of Honorable J. Earl Major, entered on March 9, 1938.
5. Decree of affirmance entered on March 9, 1938.
6. Petition for re-hearing filed March 29, 1938.
7. Order of April 11, 1938 denying re-hearing.
8. Order of April 14, 1938 staying mandate.
9. Notice of filing Praecipe.

10. This praecipe for transcript of record and service thereon.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States, within the time required by law and the rules of said Court.

Kenart M. Rahn,
Attorney for Roy G. Harris and Benjamin F. J. Odell, appellants.

April 25, 1938.

Received a copy of the above this 25th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

Endorsed: Filed April 25, 1938. Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twenty-sixth day of April, 1938, there was filed in the office of the Clerk of this Court, a Notice and Appellees Praecipe for Supreme Court Record, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To:
Kenart M. Rahn,
7 S. Dearborn St.,
Chicago, Illinois,
Attorney for Appellants,
Benjamin F. J. Odell and
Roy G. Harris.

Please take notice that on Tuesday, April 26, 1938, I shall file with the Clerk of the United States Circuit Court of Appeals of the Seventh Circuit, a praecipe requesting him to include certain matters in the transcript of the record to be filed in the Supreme Court of the United States, pursuant to a petition for certiorari to be filed by the appellants in the above entitled cause, a copy of which praecipe is herewith served upon you.

Sigmund W. David,
Attorney for Appellees.

Received a copy of the above mentioned notice and praecipe this 26th day of April, 1938.

Kenart M. Rahn,
Attorney for Appellants.
By E. L. George.

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt.	
Roy G. Harris and Benjamin F. J. Odell, *Appellants,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
vs.	
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*, *Appellees.*	

PRAECIPE.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to include in the transcript of record you are preparing to be filed in the Supreme Court of the United States, pursuant to a Petition for Certiorari to be filed by appellants Roy G. Harris and Benjamin F. J. Odell, with the Clerk of the Supreme Court of the United States, the following:

1. Petition of Appellees That the Mandate of This Court Provide That Appellants Odell and Harris Pay Appellees Costs, Interest and Damages, filed March 23, 1938.

2. Appellees' Answer to Petition for Rehearing, filed April 5, 1938.

3. This praecipe for additional matters to be included in the transcript of record and service thereof.

Sigmund W. David,
Attorney for Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Appellees.

April 26, 1938.

Received a copy of the above praecipe this 26th day of April, 1938.

Kenart M. Rahn,
Attorney for Appellants.
By E. L. George.

Endorsed: Filed April 26, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of April, 1937, there was filed in the office of the Clerk of this Court, a Notice and Additional Praecipe for Appellants, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To: Sigmund W. David,
38 S. Dearborn Street,
Chicago, Illinois,
Attorney for Appellees,
Dahl-Stedman Company, *et al.*

Please be advised that on Wednesday the 27th day of April, 1938, I shall file with the Clerk of the court an additional praecipe for additional documents for a transcript of the rec-

ord pursuant to a Petition for Certiorari to be shortly filed in the Supreme Court of the United States, in the above entitled cause, a copy of which praecipe is herewith served upon you.

Kenart M. Rahn,
Attorney for Appellants.

Received a copy of above mentioned praecipe this 27th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ADDITIONAL PRAECIPE FOR APPELLANTS.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to include in the transcript of record you are preparing to be filed in the Supreme Court of the United States, pursuant to a Petition for Certiorari to be filed by appellants Roy G. Harris and Benjamin F. J. Odell, with the Clerk of the Supreme Court of the United States, in addition to instruments heretofore requested, the following:

1. Suggestions in Opposition to Appellees' Petition Re Costs, Interest and Damages Filed March 30, 1938.

2. Corrections of Misstatements by Appellees, in Both Their Answer to Petition for Rehearing and Answer to Appellees' Suggestions Re Interest and Damages, Filed April 6, 1938.

3. This Praecipe for Additional Documents With Service Thereon.

Kenart M. Rahn,
Attorney for Appellants.

April 27, 1938.

Received copy of the above praecipe this 27th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

Endorsed: Filed April 27, 1938. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 125 to 206, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Appellant's Praecipe filed on April 25, 1938, the Appellee's Praecipe filed on April 26, 1938 and the Appellant's Additional Praecipe filed on April 27, 1938, in the following entitled cause:

In the Matter of: Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,

vs.

Average Brundage Company, *et al.*, and
Dahl-Stedman Co., *et al.*,
Appellees,

No. 6355, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1938.

(Seal)

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6546)

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 19 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. [redacted] 53

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

BARNARD & MILLER, Printers, FRANKLIN 9562, CHICAGO

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TEXT:

Remington on Bankruptcy, Fourth Edition (1936) Vol. V, Par. 2191 16

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. _____

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION.

Roy G. Harris and Benjamin F. J. Odell, respondents o an intervening petition of Dahl-Stedman Co., et al., léd in the matter of Tax Service Association of Illinois, lleged bankrupt, through their counsel, pray that a writ

of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on March 9, 1938, affirming the decision of the District Court of the United States for the Northern District of Illinois, Eastern Division.

STATEMENT OF MATTER INVOLVED.

This is an appeal from orders of the District Court in an attempted bankruptcy proceeding, resisted by alleged bankrupt as a non-profit organization. The order directed that the sum of $48,580, out of a $72,000 escrow fund in the hands of three persons, be turned over to interveners, an alleged committee (appellees).

Various trade associations, on April 9, 1935, entered into an agreement (Rec. 24) with the Tax Service Association of Illinois, the alleged bankrupt, by which the latter agreed to attempt to persuade the Department of Finance of the State of Illinois to change its ruling in connection with the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax. The alleged bankrupt, in accordance with said agreement, was paid $1500 in advance and was to receive not to exceed $20,000 if the Supreme Court of Illinois decided the Sales Tax question favorably. The alleged bankrupt agreed to retain attorney Benjamin F. J. Odell, one of the appellants and petitioners here, to act for and on behalf of the "subscribers" who were the various trade associations. Subsequently numerous contractors, by separate written contracts of various forms (Appendix *infra*) separately engaged appellant Odell (Rec. 169-170) to represent them in litigation over the extent of their liability as building contractors with respect to the so-called Sales Tax.

Pending determination of this legal issue, it was de-

cided to escrow their taxes as they accumulated. On May 2, 1935, Harris and Odell, petitioners here, together with E. M. Craig, the three escrowees, directed a letter to the National Builders Bank of Chicago, calling the attention of the bank to the opening of an account for the contractors in said bank entitled Sales Tax Escrow Fund. (Rec. 27.) The letter stated that the funds were in the custody and control of these three persons pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois, and the letter contained directions that the funds were to be paid out only on signatures of the three escrowees whose signatures appeared on the letter, or their alternates.

The identity and relations of the escrowees have become significant. E. M. Craig was the secretary of the said various trade associations and in no way connected with the alleged bankrupt. Odell was the contractors' attorney. R. G. Harris was a vice president of the alleged bankrupt.

Negotiations with the Department of Finance being unsuccessful, the contractors, through their attorney Odell, instituted a suit in the Circuit Court of Cook County for the purpose of obtaining a construction of the said Tax Act. This bill filed by the contractors, was dismissed for want of equity. The contractors then appealed to the Supreme Court of the State of Illinois. The Supreme Court deciding in their favor, reversed the decision of the Circuit Court of Cook County and remanded the cause. (Rec. 51, *Blome Co.* v. *Ames*, 365 Ill. 456, 459.) In conformity with the decision of the Supreme Court, the Department of Finance of the State of Illinois was compelled to change its ruling and extend unqualified exemption from the Sales Tax on labor furnished by contractors, which it had not conceded theretofore. (Rec. 161.)

Subsequently, the Supreme Court voluntarily modified its said decision (Rec. 163, *Herlihy Mid-Continent Co. v. Nudelman*, 367 Ill. 600, 605) and instructed that the contractors were not liable for Sales Taxes on either labor or materials but completely exempt therefrom. As a result of the efforts of Odell, their attorney, the contractors are now exempt from the tax and entitled to refunds from the State of Illinois, estimated at hundreds of thousands of dollars.

On May 3, 1937, an involuntary petition in bankruptcy was filed against the Tax Service Association of Illinois; the said association resisted the petition upon the ground that it was a "not for profit corporation," and that the court had no jurisdiction to entertain an involuntary petition because it was not a "moneyed, business, or commercial corporation" within the purview of the Bankruptcy Act; (Rec. 77), denied it was insolvent, denied that it had committed any acts of bankruptcy, denied that there were sufficient creditors. Up until the time of decision of this case in the Circuit Court of Appeals, there had been no adjudication.

On May 24, 1937, there was in excess of $314,000 in the said escrow fund, and at that time said interveners filed an intervening petition in the Bankruptcy Court, making the three escrowees, the alleged bankrupt, the bankruptcy receiver and the bank, respondents, (Rec. 18) alleging that said money belonged to them and requested its return, and that none of the money belonged to the alleged bankrupt and asking that the three escrowees be compelled to sign a check turning over the funds and that the bank be compelled to honor the check.

Immediately after the filing of the said intervening petition, it became imperative to turn over 75 per cent of

the escrow fund to the Department of Finance of Illinois in order to avoid impending heavy penalties to the contractors. (Subsequently this amount was held not due as a tax.) For this purpose, an "agreed" order was entered May 27, 1937 turning over 75 per cent of the said money in the escrow fund to the Department of Finance of the State of Illinois. (Rec. 39.) In said order appellants were given until June 3, 1937 to file their answers or other pleadings to appellees' intervening petition, and appellants as well as the alleged bankrupt filed a special answer or motion to strike said petition for want of jurisdiction of the court to determine any rights in the fund. (Rec. 54-57.) The said National Builders Bank answered reserving the right to object to the entry of orders in any form other than by the agreement under which the funds were deposited. (Rec. 46.) The bankruptcy receiver claimed that the litigation of Odell was successful, and that the sum of $20,000 of the fund should be held until adjudication. (Rec. 51-53.) There was no further hearing on the said intervening petition, or the above-mentioned answers filed in opposition thereto.

On June 29, 1937, the intervening committee abandoned said petition and filed another petition in which they asked that $48,580.40 be turned over to them, exclusive of $20,000 of the fund over which there might be a dispute. (Rec. 69.) Appellants and the alleged bankrupt again objected on the ground that the court had no jurisdiction to determine the controversy. The question as to the jurisdiction was ordered referred to a Referee.

On the afternoon of the same day counsel for interveners presented a purported order which was signed by the court without the knowledge or consent of other counsel in the case which order purported to indicate that

the Court had directed appellants (petitioners here) to answer the petition, and each of them thereupon stated that they did not desire to answer said petition and further recited that they desired to stand upon the jurisdictional question theretofore raised. (Rec. 74.) This was not a fact or what occurred.

The petition and answers thereto raising the jurisdictional questions were referred to a referee, who on July 7, 1937 made his report. (Rec. 78.) The referee recommended that appellees' request be allowed, and that the sum of $48,580.40 be paid to the intervening committee, despite the fact that the reference to him and the issue before him were solely on the one question of jurisdiction. The court over objections allowed appellants two days to file exceptions to the report, in violation of rules granting 10 days, or 20 days if the referee was a special master. Appellants asked for an extension of time to file exceptions which leave was denied them. (Rec. 92.) Exceptions inadequately drawn were filed which called the attention of the court to the erroneous language in the order of reference, and the surreptitious manner in which it was obtained by counsel for interveners. (Rec. 92-5.) Appellants then asked leave to file an answer which would reply on the merits, which also was denied them. (Rec. 96.) Order was then summarily entered overruling exceptions and approving the referee's report and directing appellants to sign a check in favor of intervening alleged special committee for $48,580.40. (Rec. 96.) The next day the court granted appellees motion striking special jurisdictional answers theretofore filed by appellants. (Rec. 100.)

The District Court subsequently denied appellants leave to appeal. Appeal was later granted by the Circuit Court of Appeals. That court affirmed the orders of the District Court.

QUESTIONS PRESENTED.

1. Has a court of bankruptcy, prior to adjudication, jurisdiction to determine a controversy between escrowees of a fund, and certain beneficiaries of that fund (strangers to the proceeding) where the bankrupt has no interest in the controversy and neither appellant nor appellee are parties to the bankruptcy proceeding, and can such jurisdiction be conferred by consent?

2. Where a party has pleaded unsuccessfully to the jurisdiction, is he thereby precluded from pleading to the merits so that a court in denying such right may make a final determination on the merits, without trial, from factual information incidentally appearing in the pleadings?

3. Where the disbursement of a portion of funds in litigation is admittedly to the advantage of all parties, and such disbursement can be affected only by an agreed order, does participation in such agreed order constitute consent to the jurisdiction of the court, especially where the jurisdiction has theretofore been unequivocally challenged, and where the order allows an answer or other pleadings, and the subsequent pleadings further deny the jurisdiction of the court?

4. Is a fund in *custodia legis* for the purpose of conferring summary jurisdiction upon the bankruptcy court where it is subject to the joint order of three persons: (1) an officer of a corporation against which an involuntary petition in bankruptcy has been filed, (2) an attorney engaged to represent individual clients through the partial instrumentality of such corporation, and (3) the secretary of various trade associations of which the clients are members who is admittedly not connected with bankrupt?

5. Does the fact that funds are "closely connected" with the affairs of an alleged bankrupt, but control of which funds is not shown, place the funds in *custodia legis* and permit a summary distribution of the funds prior to adjudication?

6. Do any one or more of the following rulings of the trial court constitute an abuse of discretion tantamount to errors of law?

A. Disregarding equity and bankruptcy rules respecting time to file exceptions to referee's report.

B. Refusing an extension of time to file exceptions to referee's report.

C. Hearing collateral issues in bankruptcy prior to adjudication.

D. Permitting counsel for appellees in absence of other counsel to present draft order of reference misrepresenting facts of what occurred.

E. Taking jurisdiction over a fund concerning which an injunction of a state court was in effect.

7. Is an alleged bankrupt, a taxpayers association organized under Illinois law "not for pecuniary profit", such a "moneyed, business or commercial corporation" within the Act as to give the bankruptcy court jurisdiction for any purpose?

REASONS FOR GRANTING THE WRIT.

1. There is no provision in the Bankruptcy Act granting the District Court general jurisdiction to determine controversies between two third parties where the dispute does not involve the bankruptcy estate and in which it has no interest. The Bankruptcy Court transcended its jurisdiction in opening the door to miscellaneous litigation thus abolishing statutory limitations of the Bankruptcy Act.

2. The decision of the Circuit Court of Appeals that the bankruptcy court had jurisdiction of the controversy between appellants and appellees, (third parties) is in conflict with a much followed decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Nixon* v. *Michaels*, 38 Fed. (2d) 420, holding that a bankruptcy court has no such jurisdiction and that jurisdiction cannot be conferred by consent. Decision at bar is also in conflict with decision in the Fourth Circuit in *Henrie* v. *Henderson*, 145 Fed. 316. The jurisdiction of the Bankruptcy Court to determine controversies where, as here, neither appellant nor appellee are parties to the bankruptcy suit, presents an important question of Federal Law which frequently arises in bankruptcy cases, and which has not been but should be determined by this court.

3. This court has never decided whether the phrase in the Bankruptcy Act: " * * * moneyed, business, or commercial corporation, * * * " (Title 11, Chap. 3, Sec. 22, (b) U. S. C. A.) confers jurisdiction to enter an involuntary adjudication over a corporation organized "not for pecuniary profit," such as a taxpayers association, or to settle collateral issues.

4. This court has never determined whether Sec. 23 of the Bankruptcy Act (Title 11, Chap. 4, Sec. 46, U. S. C. A.) relating to suits by trustees, upon consent of defendant, can be applied to confer jurisdiction over petitions of third parties to decide collateral issues foreign to the bankruptcy proceedings prior to adjudication and before appointment of a trustee.

5. This court has never decided whether disputed escrow funds not claimed by bankrupt estate are in *custodia legis* so as to give the court summary jurisdiction. The Seventh Circuit is in conflict with the Second Circuit

in this particular in *Buss* v. *Long Island Storage Warehouse* (64 Fed. (2d) 338) where summary jurisdiction was denied because the property was not unconditionally subject to the bankrupt's orders.

6. There was a departure by the trial court, sanctioned by the Circuit Court of Appeals, from the accepted and usual course of judicial proceedings in disregarding equity and bankruptcy rules, by denying sufficient time to file exceptions, by denial of leave to answer on the merits, by hearing collateral questions prematurely, by permitting counsel for appellees to present an erroneous draft order for signature in the absence of other counsel, by overruling valid exceptions to the referee's report and by the Circuit Court of Appeals determining questions on the merits without trial or hearing, all of which call for an exercise of this court's power of supervision.

7. The decision of the Circuit Court of Appeals that appellant Odell in acting as attorney for some of appellees, was an agent of the alleged bankrupt corporation, which was instrumental in his engagement, presents an important question of general law of particular interest. The finding is untenable with the weight of authority. Further, it presents an important question of Federal Law, with respect to jurisdiction of the bankruptcy court over property in the hands of an attorney for third parties,—questions which have never been decided by this court, and which should be so decided. Therein is also presented a departure from the accepted and usual course of judicial proceeding by the determining of said issues in the absence of answer or hearing thereon.

8. The Circuit Court in sanctioning the injection of a collateral controversy in the bankruptcy proceeding over which the bankrupt estate had no interest, conflicts

with the decision of the Supreme Court in the case of *Fulton Bank* v. *Hozier*, 267 U. S. 276, 280.

9. The decision of the Circuit Court of Appeals in making a finding upon issues raised by non-appealing parties, where the trial upon the merits of said issues had been postponed until the further order of the trial court, presents a question of general law probably in conflict with the weight of authority and constitutes a departure from the usual and ordinary procedure such as to call for the exercise of the powers of revision by this court.

10. The decision of the Circuit Court held that the court acquired jurisdiction over a fund closely connected with the affairs of the alleged bankrupt, even though the bankrupt had no interest in it and the record did not show control thereof by agents of the bankrupt. This presents an important question of Federal Law upon which this court has not, but should, decide. The extent of the jurisdiction of bankruptcy courts over property closely connected with the affairs of the bankrupt but not strictly bankrupt property, is an important question which frequently arises in the administration of bankruptcy estates. The present decision of the Circuit Court departs from the usual and customary practice of courts in bankruptcy matters.

11. In determining there was jurisdiction, the Circuit Court of Appeals overlooked these vital points: The case at bar concerned a controversy between strangers to the bankruptcy on a subject matter admittedly not a part of the bankruptcy estate. It is on these identical conditions that the generally followed Nixon case (38 Fed. (2d) 420) was decided. The decision in the case at bar is in conflict with the Nixon case and the weight of authority. Consent cannot confer jurisdiction over the subject mat-

ter. In this respect the Circuit Court of Appeals of this circuit is in conflict with decisions of the Supreme Court and the weight of authority as follows:

Mitchell v. *Mawrer*, 293 U. S. 237, 244.
Flanders v. *Coleman*, 250 U. S. 223, 228.
Hancock v. *Holbrook*, 112 U. S. 229, 231.
Railway v. *Swan*, 111 U. S. 379, 382-4.

Wherefore, it is respectfully submitted that this petition should be granted.

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The orders of the District Court of the United States for the Northern District of Illinois, Eastern Division (Rec. 96, 99) have not been reported.

The opinion (Rec. 129) of the Circuit Court of Appeals has been reported in 95 Fed. (2d) 373.

Jurisdiction.

The orders appealed from, of the District Court, aforesaid, were entered July 12th and 13th, 1937, respectively (Rec. 96, 99). Appeal was denied in the District Court but was allowed by the Circuit Court of Appeals for the Seventh Circuit September 11, 1937.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C229, Sec. 1-43, Stat., 938, 28 U. S. C. A. Sec. 347 (a)), also under Rule 38 of this Court. The date of the judgment to be reviewed is March 9, 1938 (Rec. 129). Petition for rehearing was denied April 14, 1938 (Rec. 197).

Statement of the Case.

The material facts and the questions involved are set forth in the foregoing petition.

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In permitting the bankruptcy court to assume jurisdiction over funds and controversies not involved in the bankruptcy estate.

2. In permitting the bankruptcy court to assume jurisdiction over a fund in litigation which was not in the control or custody of the alleged bankrupt or of the court.

3. In holding that jurisdiction over the subject matter was conferred by consent, or could be conferred by consent.

4. In permitting the bankruptcy court to entertain an intervening petition foreign to the bankruptcy proceeding.

5. In permitting the trial court to try collateral issues prior to determination of jurisdiction over the alleged bankrupt.

6. In not dismissing the controversy because of lack of jurisdiction over the alleged bankrupt.

7. In sanctioning the action of the trial court which arbitrarily restricted the time for the filing of exceptions to the referee's report, and refusing an extension thereof, all in violation of rules.

8. In sanctioning the action of the trial court in not dismissing the controversy as required by statute when lack of jurisdiction was called to its attention.

9. In sanctioning the arbitrary denial by the trial court of petitioners' right to plead to the merits, after a plea to the jurisdiction was decided unfavorably to them.

10. In finding that appellant was an agent of the alleged bankrupt when he was the attorney for contractors and hired by them.

11. In finding that the litigation with respect to the Illinois Sales Tax was unsuccessful when that issue was pending unheard, undetermined upon pleading of non-appealing parties in the court below, and the contrary was true in fact.

12. In finding that appellants neglected or refused to plead to the merits when the record shows they asked for and were denied opportunity to so plead after the overruling of their jurisdictional pleas.

13. In making findings of fact with respect to the balance of the fund, an issue which is not the subject matter of this appeal.

14. In finding that the escrow fund was closely connected with the affair of the alleged bankrupt, or was under the control of the alleged bankrupt and was, therefore, in *custodia legis*.

15. In taking jurisdiction over disputed funds involved in pending injunction in state court.

ARGUMENT.

Summary of Argument.

Point I — Court lacked jurisdiction to enter orders complained of and its decision is in conflict with other jurisdictions:

Controversy was between strangers to bankruptcy proceeding.

Funds in litigation not in custody of court or control of bankrupt and not bankruptcy assets.

Jurisdiction could not be and was not conferred.

Point II — The Court departed from the usual course of judicial procedure:

In denying hearing on the merits.

In disregarding rules of court.

Point III — The Court erred:

In hearing collateral matter when it had no jurisdiction over bankrupt.

In making findings of fact without a hearing.

ARGUMENT.

I.

The court of bankruptcy did not have jurisdiction to enter the orders appealed from.

The decision below is in conflict with the weight of authority and decisions of other circuits as well as decisions of the Supreme Court.

The general principle herein applicable with respect to jurisdiction is clearly enunciated in Remington on Bankruptcy, Fourth Edition (1936), Vol. V, Par. 2191:

> "Nor may third parties resort to the bankruptcy court to litigate their rights there, where neither the bankruptcy court has custody of the property, nor either of the parties was a party to the proceedings in bankruptcy, nor any property is recoverable by general creditors."

Neither these petitioners nor respondents here were parties to the bankruptcy proceeding. Omitting irrelevant details the facts are these: Four alleged bankrupt creditors filed an involuntary petition against a corporation. The corporation contended in good faith that it was not bankrupt. An alleged committee of three claiming to represent some two hundred odd individuals, utter strangers to the bankruptcy proceedings, sought to intervene. Their sole object in intervening was to obtain funds theretofore deposited with three escrow officers or trustees for a purpose which had no connection with the bankruptcy proceeding. The escrowees from whom they sought to obtain the funds likewise were strangers to the bankruptcy proceeding.

In the much followed case of *Nixon* v. *Michaels*, 38 Fed. (2d) 420 (8th Circuit followed in several circuits) a case in which an intervening petitioner attempted to have the bankruptcy court direct the holder of a check—proceeds of sale of bankruptcy assets—turn same over to petitioner, the court in holding that the bankruptcy court had no jurisdiction (a question raised for first time on appeal) said, on page 423:

> "But, leaving out of consideration preferential and fraudulent transfers, unless there is involved a *res* in the possession of the bankruptcy court and in which *res* as a part of the bankrupt estate third parties claim rights, the bankruptcy court has no jurisdiction to allow such third parties to come into the bankruptcy court merely to litigate therein rights even against parties to the bankruptcy proceeding, and even though the property involved may once have been part of the bankrupt estate. Remington on Bankruptcy (3d Ed.), Paragraphs 2191, 2199; *Henrie* v. *Henderson, supra; in re Hollins, supra; in re Girard Glazed Kid Co.* (D. C.), 136 F. 511; *in re Swofford Bros. Dry Goods Co.* (D. C.), 180 F. 549, 557; *in re Siegel* (C. C. A.), 256 F. 226."

Again in the case of *Henrie* v. *Henderson*, 145 Fed. 316, at 320, (4th Circuit) where a somewhat similar situation arose:

> "The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted."

The alleged bankrupt corporation in case at bar at the time the involuntary petition was filed clearly had no custody or control of the funds.

The interveners themselves admit the absence of any connecting link between the estate of the alleged bankrupt and the fund in litigation in the following language:

> "all of the moneys deposited by the petitioners in said account in the National Builders Bank of Chicago, known as the Sales Tax Escrow Fund, were at the time of their deposit and at all times since, and are now solely the moneys of the petitioners, in which moneys neither the Tax Service Association of Illinois, William L. O'Connell, Jr., Receiver of said Tax Service Association of Illinois * * * have any right or interest * * *." (Rec. 28.)

The Sales Tax Escrow Fund was something set up entirely separate and apart from the Tax Service Association. Neither E. M. Craig nor Benjamin F. J. Odell were representatives of the Tax Service Association. Roy G. Harris, although a vice-president of the Tax Service Association, at the time the alleged agreement was entered into, acted in his own individual capacity and not as a representative or officer. The funds in question were deposited in the National Builders Bank of Chicago in a special fund entitled Sales Tax Escrow Fund. Checks were made out directly to this Sales Tax Escrow Fund by the contractors. Funds could be released from this escrow only upon the written order of all three escrowees acting jointly. The interveners alleged (Rec. 28) that in the escrow matter Craig was acting as representative of the interveners and of various building associations of which the interveners were members. Craig was the secretary of the Building Construction Employers' Association of Chicago, a master association comprising the said mentioned associations. It has nowhere been even sug-

gested that he was acting for or in any sense subject to the control of the Tax Service Association. In view of Craig's admitted independence of the Tax Service Association, and of the absolute necessity of his concurrence in order to withdraw any funds from the escrow, any contention that the said fund was in the custody or control of the alleged bankrupt corporation would be patently absurd. He was selected by the contractors as positive assurance against even possible interference, domination or control of the funds by the alleged bankrupt.

The Court misconstrued the law and the facts in intimating that the funds were in the possession of the bankruptcy court. In order to be *custodia legis*, the rule is well settled, property must be in the possession of an officer of the court or must be deposited in court.

Possession becomes material only when there is a dispute between a trustee and an adverse claimant, over the *estate of the bankrupt*. The Bankruptcy Act grants jurisdiction as follows:

> "(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." U. S. C. A. Title 11, Chap. 2, Sec. 11.

Clearly jurisdiction to determine controversies must relate to the *estate of the bankrupt*.

This section has two requirements: First, the controversy must relate to the estate, and second, there must be a bankrupt—*i. e.*, there must be an adjudication. In the case at bar, neither element was present. The controversy does not relate to the estate of the bankrupt, because the $48,500 is not and never has been claimed by the bankrupt, or the receiver. There was no bankrupt—there had been no adjudication.

The decision of the Circuit Court is in conflict with a decision of the Supreme Court in the case of *Fulton Bank* v. *Hozier*, 267 U. S. 276 at 280 and 281. In that case an intervener sought to have the bankruptcy court recover property from a third person for his benefit. The Court said:

> "The general rule is that when a Federal Court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has a direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. • • •
>
> "He had no right to bring the bank, which for jurisdictional purposes was to be deemed a citizen of Georgia, Jud. Code (24, Subdiv. 16) into the Federal Court or to intervene with the affairs of the estate by injecting this controversy concerning which the receivers had no material interest—wherein the estate might lose much but could gain nothing."

There is no possession of the fund in controversy in the bankruptcy court. This fact cannot be disputed. The funds are in the National Builders Bank,—not in court. The bank has filed what might be termed a special and limited answer (Rec. 46) reserving rights to object to any distribution of funds other than by the agreement of deposit. The alleged bankrupt does not have them in its possession. The court's officers do not have possession of them.

Even if the court were correct in assuming that this was a controversy relating to the estate of the bankrupt, the decision of the Circuit Court is in conflict with the decision of the Circuit Court of the Second Circuit. In the case of *Buss* v. *Long Island Storage Warehouse*, 64 Fed. (2d) 338, 340, the bankruptcy court attempted to exercise summary jurisdiction over property in a warehouse.

The court there held that there was no summary jurisdiction, because the warehouseman was not unconditionally subject to the bankrupt's orders. The Court said on page 340:

> "* * * As we have said, the underlying notion is that for jurisdiction to attach, the bailee must be unconditionally subject to the bankrupt's orders * * *".

The alleged bankrupt could not exercise any domination over the fund, without the written concurrence of Craig, whom all agree had no connection whatever with the alleged bankrupt. The finding of the Circuit Court is directly in conflict with the Buss case, and there exists a confusion between the Circuits which this Court should clarify.

The law is well settled that jurisdiction of the subject matter cannot be conferred upon a court by consent.

In the early case of *Olds Wagon Co.* v. *Benedict*, 67 Fed. 1, 5 (C. C. A. 8, 1895), the court used language now universally concurred in:

> "* * * No consent agreement or estoppel can confer jurisdiction upon a federal court to determine any case in which the essential jurisdictional facts do not appear from the record. These rules are fundamental. They are settled by repeated adjudication of the Supreme Court, * * *".

In the case of *Nixon* v. *Michaels*, 38 Fed. (2d) 420, above discussed, the court used the following significant language on pages 422, 423:

> "(2) The question of jurisdiction was not raised directly in the court below; nevertheless, it is the duty of this court to determine the question. *M. C. & L. M. Ry.* v. *Swan*, 111 U. S. 379, * * *; *C. B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419, * * *; *B. & O. R. Co.* v. *City of Parkersburg*, 268 U. S. 35,

* * *; *Highway Const. Co.* v. *McClelland*, 14 F. (2d) 406 (C. C. A. 8)."

"(3) A District Court of the United States sitting as a court of bankruptcy is a court of limited jurisdiction. Limitations exist as to subject matter; as to territory; as to the residence and occupation of the debtor to be adjudicated; as to the status of the corporation or person to be adjudicated; and as to other matters. Remington on Bankruptcy (3rd Ed.), c. III. And consent cannot confer jurisdiction over subject matter. The express provisions of the statute and the necessary implications are controlling. *Id.* p. 66; *Bardes* v. *Howarden Bank*, 178 U. S. 524, 535, * * *; *Henrie* v. *Henderson* (C. C. A.), 145 F. 316, 320; *Nelson* v. *Svea, etc., Co.* (D. C.), 178 F. 136, 140; *In re Hollins* (C. C. A.), 229 F. 349; *Id.* (C. C. A.), 238 F. 787; *Jones* v. *Kansas City, etc., Co.*, 1 F. (2d) 649 (C. C. A. 8); *In re Judith, etc., Co.* (C. C. A.), 5 F. (2d) 307."

The lower courts in this case are definitely in conflict with the Supreme Court on the question of conferring jurisdiction over the subject matter by consent of parties as the following authorities show:

Mitchell v. *Mawrer*, 293 U. S. 237, 244.
Flanders v. *Coleman*, 250 U. S. 223, 228.
Hancock v. *Holbrook*, 112 U. S. 229, 231.
Railway v. *Swan*, 111 U. S. 379, 382-4.

There was no consent to the jurisdiction. These petitioners did not confer jurisdiction on the court by consent if that were legally possible. The Circuit Court of Appeals was in error in finding such consent.

"* * * It was at the solicitation and suggestion of the court that said 75 per cent of the funds were distributed to the Department of Finance for the various petitioners in order to avoid a penalty against said petitioners for failure to pay said taxes within the allotted time, and it was stated by respondents and agreed to in open court that the consent requested by the court to such distribution would not

prejudice the rights of respondents to have determined the question of the jurisdiction of the court over the 25 per cent balance of said funds." (Exceptions to referee's report (Rec. 93-94).)

The first intervening petition was filed on May 24, 1937. June 1, 1937, was the "deadline" for the payment to the State Department of Finance of taxes from the escrow fund in order to avoid the imposition upon and accrual to the interveners of heavy penalties in excess of $100,000.

At the time of the entry of the order it was insisted by these petitioners and agreed in open court that the consent requested by the court to such distribution would not prejudice their rights to have determined the question of the jurisdiction of the court over the 25% balance of said fund. (Rec. 93-94, 62.) That the court so understood the agreement is evidenced by the fact that the order itself gave these petitioners the right to file "their answer *or other pleadings* to said petition (Avery Brundage or first petition), * * * to and including June 3, 1937." What is meant by "other pleadings"? Clearly the expression as herein used is broad enough to include, and was intended to include, pleas to the jurisdiction.

II.

The court erred in denying a hearing on the merits.

There is nothing special or peculiar about the Bankruptcy Act which deprives a defendant or respondent of his right to plead to the merits of a cause because he has first availed of his right to plead to the jurisdiction. A plea to the jurisdiction in any controversy does not sacrifice the right to subsequent pleadings on the merits. Indeed appellants were within their rights in so enlightening the court on this important jurisdictional question.

"If in any suit commenced in a District Court * * * it shall appear to the satisfaction of the said District Court at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy property within the jurisdiction of said District Court, or that parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case cognizable * * * under this chapter, the said District Court, shall proceed no further therein, but shall dismiss the suit * * *, as justice may require, and shall make such order as to costs, as shall be just." Title 28, Paragraph 80, United States Code.

Clearly it is not the intent of this act to deprive parties of a hearing on the merits. Because of this plea to the jurisdiction, appellants were deprived of their rights to go into the facts which were vital for the court to know before issuing a summary order disposing of the large amount involved in this cause. Had the court not arbitrarily denied the motion to file answer to the merits, it would have been informed on the facts showing: that the funds involved in the petition were subject to an attorney's lien, as Odell had not been paid for the services rendered the contractors for whom he had been eminently successful, (*Blome Co.* v. *Ames*, 365 Ill. 456, 459, and *Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600, 605); that intervener's petition was not actually the petition of all of the contractors; that a liability existed if appellants as escrow officers or trustees turned over the funds without special written request from each contractor or without an indemnity for so doing; that a definite deception was practiced upon these petitioners to procure their signature to the order of May 27th; that the contractors hired Odell by written contracts independent of the contract between trade associations and the alleged bankrupt, and that he is entitled to the wage of his hire; that there

was an acceptance of the services of Odell and there was an express agreement to pay him; that an injunction was issued in the State Court that had jurisdiction of the matter in Superior Court Case No. 37 C 1716 enjoining these petitioners from disbursing the said funds in escrow and said injunction is still in force and effect; that on May 12, 1937, a restraining order of the United States District Court in this very case was entered in effect preventing the dissolution of the said injunction in the State Court and that it is still in full force and effect; that the disbursing of said funds would be a violation of said injunctions; that there was no actual consent by appellants to the jurisdiction of the court; that appellants believe the intervening petitions were filed without authority and knowledge of many of the contractors. These and other important facts do not pass before the court for consideration upon a summary disposition of this cause on a mere jurisdictional plea, yet $48,580 involved was thus arbitrarily disposed of.

These petitioners are thus deprived of due process of law as secured to them by the United States Constitution in Article V of Amendments thereof. They have not been given their day in court to present their defense or be heard on the merits thereof.

The Court Abused Its Discretion in Disregarding the Equity and Bankruptcy Rules and Denying Sufficient Time to File Exceptions.

In the haste which characterized this entire proceeding, confusion and misunderstanding resulted between referee and court, and which, but for the gravity of the situation, might be characterized as a comedy of errors having the effect of depriving appellants of any hearing whatsoever upon the merits of the controversy.

The second intervening petition was filed June 29, 1937. (Rec. 69.) Appellants had already filed their special answers questioning the jurisdiction of the court and otherwise reserving all rights. (Rec. 54-55.) The court had previously ordered the filing of answers. (Rec. 41.) The special answers of appellants, previously filed to the jurisdiction, were permitted to stand to the second petition. (Rec. 74.) The latter petition, together with the special answers, were referred to the referee the same day they were filed, June 29, 1937. (Rec. 73-5.) That order of reference was limited to the sole question of jurisdiction. (Rec. 75.) Other issues then pending were not referred to the referee. (Rec. 46-53.) Notwithstanding the restriction on the referee to hear and report on the jurisdiction question only, he reported on the merits without having any hearing on the merits, and found allegations of the second petition true. (Rec. 78.)

In his report the referee referred to certain sections in the order of reference (Rec. 84, 85) in which it appears that the appellants were asked whether or not they desired to answer the second petition. The order recites appellants responded that they did not desire to answer said petition but asked that the special answer to the first petition stand to the second petition, and to which the court consented. The order is incorrect. The alleged statement by appellants that they wished to be heard first on the jurisdiction before answering to the merits should not be construed as depriving them of their right to be heard on the merits later.

The order of reference was obtained under most unusual circumstances. Sigmund W. David, attorney for the intervening petitioners, presented his order of reference to the court in the absence of all other counsel and without their approval, and copies of the draft order were

not given to other counsel until the day after it was entered. (Rec. 92.) That reference order falsely related that appellants had stated they did not desire to answer the petition. At no time did the appellants say they did not desire to answer the petition or be heard on the merits. To the contrary they sought hearing on the merits. (Rec. 96.)

On July 7, 1937, the referee's report was presented to the court recommending the signing of a check by your petitioners for some $48,580 and further recommending that the National Builders Bank of Chicago honor and pay the same despite the fact the matter had not been referred to the referee on the bank's answer and the bank had not been present at the hearing nor had there been any hearing on the merits concerning the bank's, or anyone else's answer.

The court on July 9, 1937 (Rec. 91), ordered appellants to file exceptions to the referee's report within two days. The court was requested at this time to allow them ten days as provided by Rule 14 of the Bankruptcy Act for the purpose of filing their exceptions to the referee's report. The trial court, however, took the position that the matter had been referred to the referee as a Special Master for the purpose of determining the issues in the petition. Thereupon appellants drew it to the court's attention that (for Master's reports) under Rule 66 for Courts of Equity of the United States, appellants should be allowed twenty days in which to file exceptions. (Rec. 95.) The trial court, however, insisted the matter should be summarily disposed of within three days and this, nowithstanding the fact that the hearing on the adjudication of the alleged bankrupt, over its strenuous objection, had been continued to the fall. On the coming into court on the 12th day of July, 1937, appellants again moved the

court for a sufficient length of time in which to file their exceptions to the Special Master's report, which motion the trial court denied. (Rec. 92.) Thereupon these appellants filed their exceptions to the report (Rec. 92), summarily and insufficiently prepared, in which, however, they briefly set forth the injustice done them in hurrying this matter and depriving them of a respectable hearing.

There was set forth in their exceptions that the order of reference dated June 29, 1937, stated erroneous facts and that the order was presented to the court in the absence of other counsel; that appellants were desirous of having their special answers to the jurisdiction disposed of before they answered to the merits and that appellants did not waive their right to plead to the merits; that the erroneous portion of said order had misled the Special Master, and as his report indicated, furnished the sole reason for his recommending that the prayer of the intervening petition be granted against appellants without appellants being given an opportunity to be heard on the merits. (Rec. 92.)

Those exceptions set forth many reasons why the Special Master's report should not be approved and the court's attention is respectfully directed to them on pages 92 to 95 of the Record.

The trial court sustained the Special Master's report, as erroneous as it was, and thereby denied appellants, not only their right to sufficient time to prepare and argue exceptions to the Special Report, but also deprived appellants of their right to be heard in court on the merits of the issues.

The District Court, and the Circuit Court of Appeals in affirming the District Court, have so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure as to call for an exercise of this court's power of supervision.

III.

Further errors of the Circuit Court of Appeals and the Trial Court.

NO JURISDICTION OVER ALLEGED BANKRUPT.

Both the trial and the reviewing court committed error in entertaining the intervening petition. The alleged bankrupt is a corporation organized "not for pecuniary profit" under the Laws of the State of Illinois, Smith-Hurd, Chapter 32, Sec. 158-163. (Rec. 6, 56, 77.)

A taxpayers association organized not for pecuniary profit, is not within the purview of the Bankruptcy Act:

> "* * * Any unincorporated company, and any moneyed business, or commercial corporation (except a municipal, railroad, insurance, or banking corporation, or a building and loan association) owing debts to the amount of $1,000 or over, may be adjudicated an involuntary bankrupt upon default or an impartial trial." Section (b) of Bankruptcy Act. (Title 11, Chapter 3, Section 22, U. S. C. A.)

The Court had no jurisdiction over the alleged bankrupt because the alleged bankrupt was not and cannot be subject to the Act. Of necessity, the court had no jurisdiction over collateral matters, either before or after adjudication. In this case, all the orders were entered prior to the adjudication. This question of jurisdiction may be attacked at any time by anybody.

Respondents may contend that an adjudication determines this issue, however, if the trial court has no jurisdiction over the subject matter, all orders, collateral or otherwise, are null and void and subject to collateral attack.

The Supreme Court has never determined the question of jurisdiction of Bankruptcy Courts over corporations

organized "not for pecuniary profit", and has never determined the power and authority of a Bankruptcy Court to entertain purely collateral matters prior to adjudication. These questions should be decided by this court.

Disregard of Rules.

The trial court erred in disregarding Equity Rule 66, applicable here because the referee sat as a special master:

> "The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the equity docket. The parties *shall have* 20 days from the time of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

The arbitrary restriction of time in which to file exceptions to the report of the referee, and the flat refusal of a motion for an extension of time (Rec. 92) when taken in connection with the other errors in this case, constitutes a departure from the usual and ordinary standard of judicial procedure as to call for an exercise by this court of its powers of supervision. Do the court rules apply only to litigants and not to the courts?

Approval of Untrue Orders.

The sanction by the Circuit Court of Appeals of the trial court's error in permitting counsel for appellees to present an untrue order for signature without the knowledge of other counsel, and the subsequent overruling of appellants exceptions which called attention to the injury and imposition (Rec. 92) are a departure from the usual

and accepted standards of judicial procedure, and when taken in consideration with the other errors of the trial court, calls for the exercise by this court of its powers of supervision.

Findings of Fact Without Trial.

The departure by the Circuit Court from its usual procedure by making findings of fact upon issues not before the court, calls for the exercise by this court of its powers of supervision. For example, the Circuit Court of Appeals purported to find that Odell was unsuccessful in the litigation with reference to the Sales Tax. That issue was not before the Circuit Court of Appeals and was never tried in either court although pending undisposed of in the District Court on pleadings of non-appealing parties. The Illinois reports heretofore cited show Odell was eminently successful in the tax case. Again the court erred in finding that appellants neglected or refused to answer to the merits. They had asked for an opportunity to plead to the merits on July 12, 1937, prior to the entry of the order appealed from. (Rec. 96.) The Court arbitrarily denied that motion. The appeal was from that and other orders.

The Circuit Court of Appeals erred in finding that Odell, in acting as attorney for the contractors, was an agent of the alleged bankrupt. (Rec. 132.) Each of the contractors had separately engaged Odell to represent them, and appendix *infra* is an example of one of the forms of engagement. The Tax Service Association was not a party to the sales tax litigation. The contractors brought suit in their own names in the Circuit Court of Cook County and the Supreme Court of Illinois. Odell was their attorney. He was clearly the agent of the contractors, not of the alleged bankrupt.

The Circuit Court of Appeals erred in making findings of fact when the lower court had denied pleading on the merits and hearing on the facts. This was a departure from the usual and accepted judicial procedure such as to call for supervision by this court. This method of procedure is contrary to the weight of authority.

CONCLUSION.

Because this case involves conflicts with the United States Constitution, with the United States Statutes, with decisions of the United States Supreme Court, with decisions of other circuits and because the lower courts departed from the usual course of judicial proceedings, it is urged that the writ of certiorari, as herein prayed, be granted.

Respectfully submitted,

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

APPENDIX.

Example of form of employment of attorney Odell used by some of the contractors:

"On the recommendation of The Builders Association, we hereby consent to the employment of Benj. F. J. Odell as our attorney to represent us in negotiations and litigation in an effort to change the present ruling of the Retailers' Occupation Tax Act as it applies to us, the expense in no event to exceed three months' savings of such taxes, payment of our share of the expenses to be made with the approval of The Builders Association under their agreement with said Odell as to a gross maximum fee. The above is subject to Bulletins issued by Mr. Craig dated April 17th and 23rd, 1935.

DAHL-STEDMAN CO.
GEO. V. DAHL
(SEAL) *As President.*

DAHL-STEDMAN CO.
ELMORE W. STEDMAN
April 25, 1935 *As Sec'y & Treas."*
(Rec. 169-170)

The material provisions of the bankruptcy act, with reference to jurisdiction of the District Court, are as follows:

"(7) Cause the estate of bankrupt to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise provided * * *"

(Title 11, Chapter 2, Section 11, U. S. C. A.)

"(a) The United States District Court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trus-

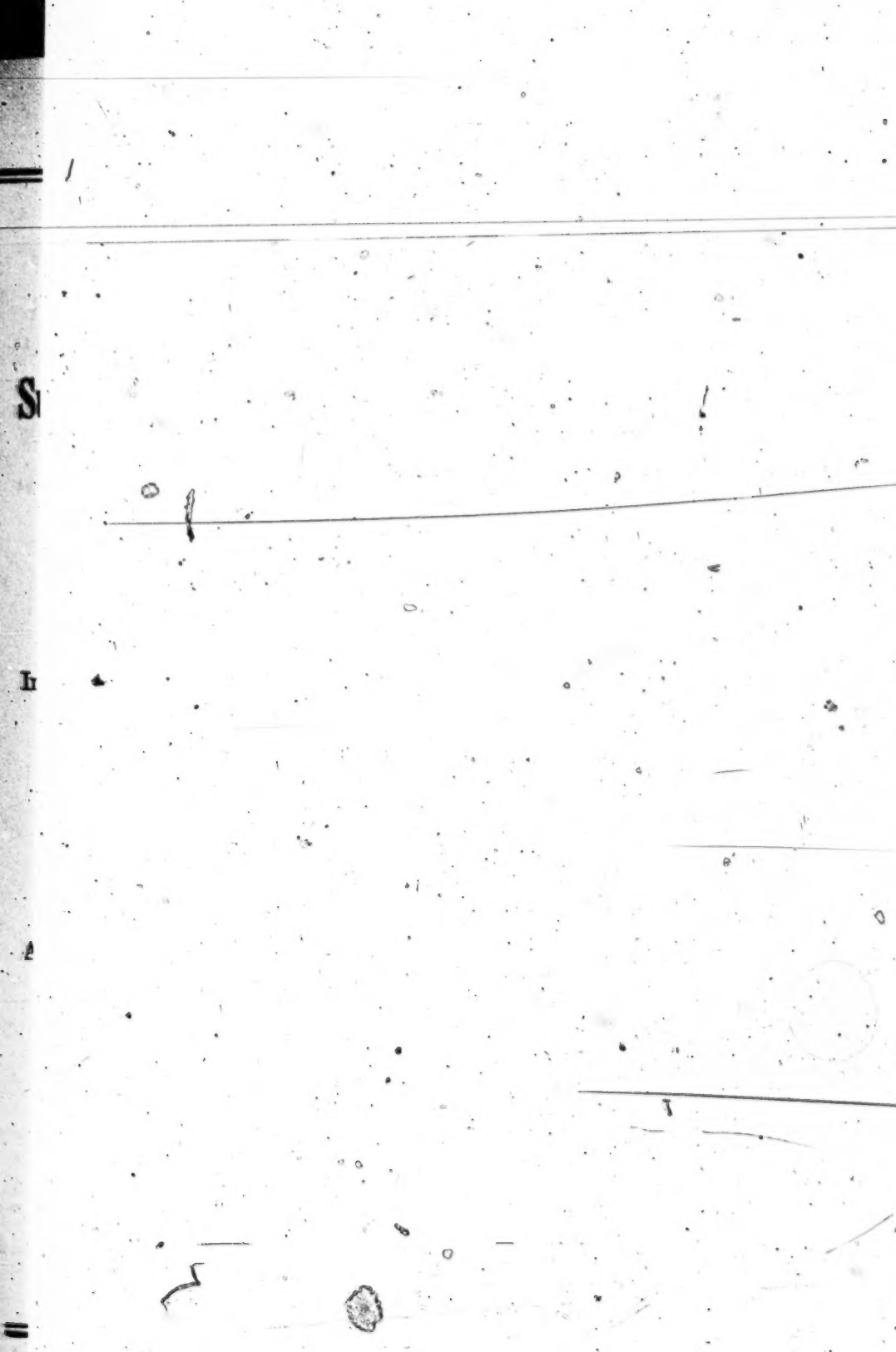
tees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96, subdivision b of this title; section 107, subdivision e of this title; and section 110, subdivision e, of this title."

(Title 11, Chapter 4, Sec. 46, U. S. C. A.)

"(b) Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or on impartial trial, and shall be subject to the provisions and entitled to the benefits of this title."

(Title 11, Chapter 3, Section 22, U. S. C. A.)



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHLSTEDMAN CO., et al.,
Respondents.

BRIEF FOR PETITIONERS

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BARNARD & MILLER, Printers, FRANKLIN 0562; CHICAGO

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Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW.

The orders of the District Court of the United States for the Northern District of Illinois, Eastern Division (Rec. 96, 99) have not been reported.

The opinion (Rec. 129) of the Circuit Court of Appeals is reported in 95 Fed. (2d) 373.

JURISDICTION.

The orders of the District Court appealed from, as aforesaid, were entered July 12th and 13th, 1937, respectively, (Rec. 96, 99). Appeal was denied in the District Court but was allowed by the Circuit Court of Appeals for the Seventh Circuit September 11, 1937.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (C 229, Sec. 1-43, Stat., 938, 28 U. S. C. A. Sec. 347 (a)), also under Rule 38 of this Court.

The date of the judgment to be reviewed is March 9, 1938, (Rec. 129). Petition for rehearing was denied April 14, 1938, (Rec. 197). Certiorari to the Seventh Circuit was granted by this court May 31, 1938.

STATEMENT OF THE CASE.

This is an appeal from orders of the District Court in an attempted bankruptcy proceeding, resisted by alleged bankrupt as a non-profit corporation. The order directed that the sum of $48,580, out of a $72,000 escrow fund held by three trustees be turned over to an alleged committee, as interveners, (the respondents herein).

The escrow fund, the balance of which is now in controversy, arose in this manner: Petitioner Odell is an attorney with considerable experience in sales tax matters. Several hundred building contractors' through various trade associations, sought Odell's service and requested him to represent them in obtaining a construction favorable to them with respect to their sales tax liabilities under the Illinois Retailers' Occupation Tax Act, commonly known as the Sales Tax Act.

Odell expressed his willingness to represent the various contractors, but on condition that some arrangement be made whereby he would be relieved of the heavy burden of purely clerical details and labor incident to such an undertaking. Thereupon the various trade associations procured the alleged bankrupt, Tax Service Association, of which some of the associations and individual contractors were members, to handle these details, and entered into a written agreement with Tax Service Association agreeing to pay the said association $1,500 for clerical services, and designating the manner in which the payment of Odell's fee should be apportioned among the various contractors and, incidentally, limiting the expense to which the various contractors should be subject in the aggregate to $15,000 or $20,000, depending on how far the litigation was carried. The trade associations notified Odell of this arrangement and later the individual contractors engaged Odell by individual written contracts (Appendix *infra* and also Rec. 25). Following the separate engagement of Odell by all of the contractors individually, he approved the agreement between the contractors' associations and the Tax Service Association.

Pending determination of this legal issue, and to pave the way for an interlocutory injunction restraining the taxing authorities, it was decided to escrow the taxes claimed by the State of Illinois as they accumulated. On May 2, 1935, Harris and Odell, petitioners herein, and the third escrowee or trustee, E. M. Craig, directed a letter to the National Builders Bank of Chicago, calling the attention of the bank to the opening of an account for the contractors in that bank entitled Sales Tax Escrow Fund (Rec. 27). The letter stated that the funds were in the custody and control of these three pending the outcome of proposed negotiations with the Department of Finance of

the State of Illinois, and the letter contained directions that the funds were to be paid out only on signatures of the three escrowees, Craig, Harris and Odell, or their alternates, whose names appeared in the letter.

The identity and relations of these escrowees have become significant. E. M. Craig was the secretary of the said various trade associations and in no way connected with the alleged bankrupt. Odell was the contractors' attorney. R. G. Harris was a vice president of the alleged bankrupt.

Negotiations with the Department of Finance being unsuccessful, the contractors, through their attorney Odell, instituted a suit in the Circuit Court of Cook County for the purpose of obtaining a construction of the said Tax Act. This bill filed by the contractors, was dismissed for want of equity. The contractors then appealed to the Supreme Court of the State of Illinois. The Supreme Court deciding partially in their favor, reversed the decision of the Circuit Court of Cook County and remanded the cause (Rec. 51, *Blome Co.* v. *Ames*, 365 Ill. 456, 459). In conformity with the decision of the Supreme Court, the Department of Finance of the State of Illinois was compelled to change its ruling and extend unqualified exemption from the Sales Tax on labor furnished by contractors, which it had not conceded theretofore (Rec. 161).

Subsequently, the Illinois Supreme Court voluntarily modified and extended its said decision on the said *Blome* case (Rec. 163, *Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600, 605) and held that the contractors were not liable for Sales Taxes on either labor or materials, but completely exempt therefrom. As a result of the efforts of Odell, their attorney, the contractors are now exempt from the tax and entitled to refunds from the State of Illinois, estimated at hundreds of thousands of dollars, as

provided by special refund provision of the Act. Smith Hurd Illinois Annotated Statutes, Chap. 120, Sec. 445. (Appendix *infra*).

On May 3, 1937, an involuntary petition in bankruptcy was filed against the Tax Service Association of Illinois. The said association resisted the petition upon the ground that it was a "not for profit corporation", and that the court had no jurisdiction to entertain an involuntary petition because the corporation was not a "moneyed, business, or commercial corporation" within the purview of the Bankruptcy Act; denied it was insolvent; denied that it had committed any acts of bankruptcy; and denied that there were sufficient creditors (Rec. 77). Up until the time of decision of this case in the Circuit Court of Appeals, there had been no adjudication, although adjudication has since followed.

On May 24, 1937, there was in excess of $314,000 in the said escrow fund, and at that time said interveners filed an intervening petition in the said bankruptcy proceeding, making the three escrowees, the alleged bankrupt, the bankruptcy receiver and the bank, respondents (Rec. 18), alleging in substance that most of the said money belonged to interveners and requested its return (Rec. 28); that the money was under the control of Harris and Odell (Rec. 31-2); that Harris and Odell were requested to cease acting as agents of interveners but had refused (Rec. 32); that none of the money belonged to the alleged bankrupt and asking that the three escrowees be compelled to sign a check turning over the funds to interveners, an alleged committee of three, and that the bank be compelled to honor the check.

Immediately after the filing of the said intervening petition, it became imperative to turn over 75% of the escrow fund to the Department of Finance of Illinois in

order to avoid impending heavy penalties to the contractors. (Seven months later this amount was held not due as a tax.) For the purpose of avoiding this penalty to interveners an "agreed" order, was entered May 27, 1937, turning over 75% of the said money in the escrow fund to the Department of Finance of the State of Illinois (Rec. 39). The 75% was a compromise figure (representing a tax on material only) made with the State of Illinois for said contractors (interveners) and many other contractors who had deposited their taxes in said escrow fund, the latter contractors not being parties to this proceeding. In said order Harris and Odell were given until June 3, 1937, to file their answers or other pleadings to the intervening petition, and on that day they, as well as the alleged bankrupt, filed a motion to strike said petition for want of jurisdiction of the court to determine any rights in the fund (Rec. 54-57). The said National Builders Bank answered reserving the right to object to the entry of orders for payment in any form other than by the agreement under which the funds were deposited (Rec. 46). The bankruptcy receiver in his answer maintained that the litigation, by Odell, for the contractors was successful, and that $20,000 of the said fund should be held until adjudication (Rec. 51-53). There was no further hearing on the said intervening petition, or the above-mentioned motions to strike or answers filed in opposition thereto.

On June 29, 1937, the intervening committee abandoned its said petition and filed another petition in which it asked that $48,580.40 be turned over to them, exclusive of $20,000, which the receiver requested be held pending adjudication (Rec. 69). The above motions of Harris and Odell, to strike, were again urged to the second petition and the question of jurisdiction was referred to a referee (Rec. 73).

On the afternoon of the same day counsel for interveners (respondents) presented a purported order which was signed by the court without the presence, knowledge or consent of other counsel in the case, which order purported to indicate that the court had directed Harris and Odell to answer the petition, and that each of them had thereupon stated that he did not desire to answer said petition and further recited that he desired to stand upon the jurisdictional question theretofore raised (Rec. 74). This part of the order was not true; at no time did either Harris or Odell, petitioners here, state that he did not desire to answer said petition. In fact they merely stated that they desired to raise first the question of jurisdiction (Rec. 92).

On July 7, 1937, the referee recommended that the interveners' request be allowed, and that the sum of $48,580.40 be paid to the intervening committee (Rec. 78) despite the fact that the reference to him and the issue before him were solely on the one question of jurisdiction. The court, over objections, allowed petitioners here two days to file exceptions to the report, in violation of rules granting 10 days, or 20 days if the referee was a special master. These petitioners asked for an extension of time to file exceptions, which leave was denied them (Rec. 92). Exceptions inadequately drawn were filed which called the attention of the court to the erroneous language in the order of reference, and the surreptitious manner in which that order was obtained by counsel for interveners (now respondents) (Rec. 92-5). Petitioners then immediately asked leave to file an answer to the merits, which leave was denied them (Rec. 96). An order was then summarily entered overruling exceptions, approving the referee's report, and directing these petitioners to sign a check for $48,580.40 in favor of the intervening so-

called special committee (Rec. 96). The next day the court granted interveners' (respondents) motion to strike the special answers theretofore filed by petitioners here to the jurisdiction (Rec. 100).

The District Court subsequently denied petitioners here leave to appeal. Appeal was later granted by the Circuit Court of Appeals. That court affirmed the orders of the District Court.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In permitting the bankruptcy court to assume jurisdiction over funds and controversies not involved in the bankruptcy estate.

2. In permitting the bankruptcy court to assume jurisdiction over a fund in litigation which was not in the control or custody of the alleged bankrupt or of the court.

3. In holding that jurisdiction over the subject matter was conferred by consent, or could be conferred by consent.

4. In permitting the bankruptcy court to entertain an intervening petition foreign to the bankruptcy proceeding.

5. In finding that the escrow fund was closely connected with the affairs of the alleged bankrupt, or was under the control of the alleged bankrupt and was, therefore, in *custodia legis*.

6. In holding that mere constructive possession is sufficient to sustain a reclamation proceeding.

7. In permitting the trial court to try collateral issues

prior to determination of question of jurisdiction over the alleged bankrupt.

8. In not dismissing the controversy because of lack of jurisdiction over the alleged bankrupt.

9. In sanctioning the action of the trial court in arbitrarily restricting the time for the filing of exceptions to the referee's report, and refusing an extension thereof, all in violation of rules.

10. In sanctioning the action of the trial court in not dismissing the petition as required by statute when lack of jurisdiction apparent on face of the petition, was called to its attention.

11. In sanctioning the arbitrary denial by the trial court of these petitioners' rights to plead to the merits, after a plea to the jurisdiction had been decided unfavorably to them.

12. In finding that Harris and Odell were acting as agents of the alleged bankrupt in serving as trustees of the funds in litigation.

13. In finding that the litigation with respect to the Illinois Sales Tax was unsuccessful when that question was pending unheard, undetermined upon pleading of non-appealing parties in the court below, and the contrary was true in fact.

14. In finding that these petitioners neglected or refused to plead to the merits when the record shows that they asked for and were denied opportunity so to plead after the overruling of their jurisdictional pleas.

15. In making findings of fact with respect to a balance of a certain fund which was not the subject matter of appeal.

16. In taking jurisdiction over disputed funds involved in pending injunction in a state court.

SUMMARY OF ARGUMENT.

POINT I. The court of bankruptcy did not have jurisdiction to enter the orders appealed from.

1. This controversy was not a bankruptcy controversy but one between strangers to the bankruptcy proceeding.

2. This litigation constitutes neither a proceeding in bankruptcy nor a controversy arising out of bankruptcy and hence cannot be cognizable by a court of bankruptcy.

3. The escrowees were not agents for the alleged bankrupt nor were they subject to its control.

4. There was neither actual nor constructive possession within the meaning of such terms as used by the authorities.

5. Mere constructive possession is not sufficient to confer upon the bankruptcy court jurisdiction over a reclamation suit.

6. The petitioners here did not, in fact consent to the jurisdiction of the bankruptcy court.

7. Consent cannot confer jurisdiction of subject matter, *i. e.*, jurisdiction on the bankruptcy court of a controversy between strangers to the bankruptcy proceeding.

POINT II. The orders appealed from deprived these petitioners of property without any opportunity whatever to be heard on the merits of the issues.

POINT III. The Circuit Court of Appeals and the Trial Court commimtted further errors requiring reversal.

1. The court erred in entertaining an involuntary petition against a corporation organized not for profit.

2. The court erred in determining an intervening controversy when its jurisdiction over the bankruptcy proceeding was in issue and undetermined.

3. The court disregarded Equity Rule 66 and denied sufficient time to file exceptions to the Special Master's Report.

FOREWORD.

In view of the extraordinary situation here, your petitioners crave the initial attention of the Court to one or two phases, in the light of which it is asked that all aspects of the present controversy be viewed. First, the facts developed in the trial court were *ex parte* facts of interveners alone. Petitioners did not have an opportunity to be heard, and present their facts. Second, the assumption of jurisdiction by the bankruptcy court was not merely caused by ordinary error or oversight; the assumption and retention of such jurisdiction was brought about by the deliberate contrivance of the interveners to create certain false appearances and indicia of jurisdiction, *e. g.*, by joining the receiver as defendant to suggest some connection with the bankrupt estate, and also by the entry of the "agreed" order of May 27th, 1937.

ARGUMENT.

Point I.

The court of bankruptcy did not have jurisdiction to enter the orders appealed from.

At the outset petitioners are at a tactical disadvantage in arguing to the jurisdiction, in that neither the bankruptcy court, nor the Circuit Court of Appeals, nor the respondents have at any stage of the proceedings enunciated clearly the theory upon which the fundamental jurisdiction of the bankruptcy court was predicated. That the jurisdiction must be bankruptcy jurisdiction is apparent, inasmuch as the intervening petitions were filed in the bankruptcy court, and inasmuch as no diversity of citizenship, federal question, or any other possible basis for federal jurisdiction is anywhere suggested in the pleadings, evidence, or orders of the court. In view of the limited nature of bankruptcy jurisdiction, it would seem incumbent upon those depending upon it to indicate the basis therefore.

The Circuit Court of Appeals devotes approximately a page and a third of its opinion to the problem of jurisdiction; which it characterizes as "the essential question presented" (Rec. 132). A portion of the opinion would indicate that the court regarded the proceeding as one for reclamation. Inasmuch as the opinion of the Circuit Court of Appeals seems to summarize the position of respondents, and we may assume, that of the bankruptcy

court, we direct brief attention to the portion of that opinion dealing with the subject of jurisdiction:

> "The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund * * *. It seems to us, even though it has been finally determined the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund. If we be wrong in this view, however, the agreed order of May 27, 1937, expressly conferred jurisdiction * * *.
>
> "It is insisted, however, by appellants, that jurisdiction cannot be conferred by consent. Many cases are cited in support of this contention, but we think they are distinguishable from the situation here. As was said in *Page* v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27, on page 33 * * *" (Rec. 132).

The court then quotes a rather long dictum from said *Page* case to the effect that constructive possession confers jurisdiction.

It will be noted in case at bar that although the court purported to set out the consent theory as an alternative ground of jurisdiction, the court meets the argument that jurisdiction cannot be conferred by consent by its return to the constructive possession theory of the *Page* case. Clearly the court declined to attempt to sustain the consent argument independently.

For the Circuit Court of Appeals to render the decision it did in this case, it was necessary for it to endorse the erroneous contentions of law and fact made by interveners in the District Court. These erroneous assumptions are:

1. That the proceeding involved bankruptcy litigation and was not between strangers to the bankruptcy proceeding.

2. That this litigation constituted either a proceed-

ing in bankruptcy or a controversy arising out of bankruptcy.

3. That the three escrowees were merely agents for the alleged bankrupt, and under its control.

4. That there was either actual or constructive possession within the meaning of those terms as used in the cases relied upon.

5. That mere constructive possession is sufficient to confer upon the bankruptcy court jurisdiction of a reclamation suit. (An obvious failure to distinguish between "reclamation" proceedings and "turnover" proceedings.)

6. That the appellants consented to the jurisdiction of the bankruptcy court.

7. That consent can confer jurisdiction of subject matter, *i. e.*, confer jurisdiction on the bankruptcy court over a controversy between strangers to the bankruptcy proceeding.

1.

The controversy was not a bankruptcy controversy but one between strangers to the bankruptcy proceeding.

Neither petitioners nor respondents were parties to the bankruptcy proceeding. Omitting irrelevant details the facts were these:

Four alleged creditors filed an involuntary petition in bankruptcy against a taxpayers association organized under the laws of the State of Illinois as a not-for-profit corporation. The corporation contended in good faith that it was not bankrupt and that anyway it could not be adjudicated an involuntary bankrupt.

A committee of three *claiming* to represent some two hundred building contractors, utter strangers to the bankruptcy proceeding, sought to intervene. The sole object in intervening was to obtain possession of funds

deposited, long prior to the bankruptcy proceeding, with three escrow officers or trustees for a purpose which had no connection whatever with that bankruptcy proceeding. The escrowees or trustees from whom they sought to obtain the funds were likewise strangers to the bankruptcy proceeding.

The general principle herein applicable with respect to jurisdiction is clearly enunciated in *Remington on Bankruptcy*, Fourth Edition (1936), Vol. V, Par. 2191:

> "Nor may third parties resort to the bankruptcy court to litigate their rights there, where neither the bankruptcy court has custody of the property, nor either of the parties was a party to the proceedings in bankruptcy, nor any property is recoverable by general creditors. * * *"

In the much followed case of *Nixon* v. *Michaels*, 38 Fed. (2d) 420 (8th Circuit, followed in several circuits), a case in which an intervening petitioner attempted to have the bankruptcy court direct the holder of a check—proceeds of a sale of bankruptcy assets—to turn the same over to the petitioner therein, the court in holding that the bankruptcy court had no jurisdiction (a question raised for the first time on appeal) said, on page 423:

> "But, leaving out of consideration preferential and fraudulent transfers, unless there is involved a *res* in the possession of the bankruptcy court, and in which *res* as a part of the bankrupt estate third parties claim rights, the bankruptcy court has no jurisdiction to allow such third parties to come into the bankruptcy court merely to litigate therein rights even against parties to the bankruptcy proceeding, and even though the property involved may once have been part of the bankrupt estate. Remington on Bankruptcy (3rd Ed.), Paragraphs 2191, 2199; *Henrie* v. *Henderson, supra; in re Hollins, supra; in re Girard Glazed Kid Co.* (D. C.), 136 F. 511; *in re Swofford Bros. Dry Goods Co.* (D. C.), 180 F. 549, 557; *in re Siegel* (C. C. A.) 256 F. 226."

Also in the case of *Henrie* v. *Henderson*, 145 Fed. 316 (4th Circuit, certiorari denied, 206 U. S. 563) where a somewhat similar situation arose, the court said at page 320:

> "* * * The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted."

Possession of the subject matter of a controversy in the bankruptcy court becomes material only when there is a dispute between a bankruptcy trustee and a claimant of property which is, or which is claimed to be, the *estate of the bankrupt*. In such cases the Bankruptcy Act grants jurisdiction as follows:

> "(7) cause the *estates of bankrupts* to be collected, reduced to money and distributed, and determine controversies in relation *thereto*, except as herein otherwise provided;"
>
> United States Code, Title 11, Chap. 2, Sec. 11.

Clearly jurisdiction to determine controversies must relate to the *estate of the bankrupt*, and must bear some relationship to the subject of bankruptcy and the purpose of the bankruptcy act. That purpose has been clearly defined by this court in the case of *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, on page 554; 59 L. Ed. 713, 35 Sup. Ct. Rep. 283, 34 A. B. R. 181, as follows:

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution

among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortune. * * *"

The decision of the Circuit Court of Appeals, in case at bar, is in conflict with a decision of this court in the case of *Fulton Bank* v. *Hozier*, 267 U. S. 276 at 280 and 281. In that case an intervener sought to have the bankruptcy court recover property from a third person for his benefit. This court said:

"The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has a direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. * * *"

"* * * He had no right to bring the bank, which for jurisdictional purposes was to be deemed a citizen of Georgia (Jud. Code § 24, Subdiv. 16), into the Federal Court or to interfere with the affairs of the estate by injecting this controversy concerning which the receivers had no material interest—wherein the estate might lose much but could gain nothing."

It is submitted that under no circumstances could the dispute between petitioners and respondents be characterized as relating to the estate of the alleged bankrupt. The fund in litigation never was any part of the bankrupt estate. Neither the bankrupt nor the receiver, nor any creditor of the bankrupt, had claimed any interest in it. Neither petitioners nor respondents are, or claim to be, creditors of the alleged bankrupt.

As was said in *Nixon* v. *Michaels*, 38 Fed. (2d) 420, at 423-424:

"And, even if there be a *res* in the bankruptcy

court, it does not follow that it may be reached by a third party—a stranger to the bankruptcy proceedings. Thus it is held that the bankruptcy court has no jurisdiction to entertain a garnishment proceeding where a third party seeks to attach a dividend which has been declared by the trustee * * *. *In re American Elec. Tel. Co.*, (C. C. A.) 211 Fed. 88 * * * See also * * * *In re Argonaut Shoe Co.* (C. C. A.) 187 Fed. 784."

The subject matter of the case at bar is cognizable in equity only. The petition is in the nature of a bill against third parties for accounting and for specific performance. It involves numerous complicated questions of law and fact. Such litigation may extend over a period of years. Certainly the estate is not interested and the administration of its affairs should not be so burdened or hampered.

The present controversy, being one between strangers to the bankruptcy proceeding and over a fund in no sense part of the bankruptcy estate, is not cognizable in a court of bankruptcy.

2.

This litigation constitutes neither a proceeding in bankruptcy nor a controversy arising out of bankruptcy and hence cannot be cognizable by a court of bankruptcy.

As was said in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 531:

"In *Lathrop* v. *Drake*, (1875), 91 U. S. 516, the jurisdiction conferred on the District Court and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this Court, speaking by Mr. Justice Bradley, as consisting of 'two distinct classes first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or

refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." * * *

That this distinction between proceedings in bankruptcy and controversies arising out of bankruptcy has been preserved in the Act of 1898 has been consistently held by this court:

Bardes v. *Hawarden Bank*, 178 U. S. 524.

First National Bank v. *Chicago Title & Trust Co.*, 198 U. S. 280.

Schumacher v. *Beeler*, 293 U. S. 367.

Omitting subsection 7 of Section 2 of the Bankruptcy Act, it is so clear that the present litigation cannot possibly come within any of the other provisions of the said Section 2 that argument in support of that proposition is unnecessary. Subsection 7 of Section 2 is as follows:

"cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;"

(The word "thereto" refers to the estates of the bankrupt as has been demonstrated in our argument immediately proceeding.)

It is clear that the words "except as herein otherwise provided" refer to Section 23 of the Act, as this court has held in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 529, and reiterated in *First National Bank* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 289.

Section 23 of the Act is as follows:

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity,

as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96, subdivision b, of this title; section 107, subdivision e, of this title; and section 110, subdivision e, of this title."

30 Stat. 552.

United States Code, Title 11, Chap. 4, Sec. 46.

Section 23 deals solely with controversies to which the trustee is a party. In the present litigation no trustee had been appointed; hence no jurisdiction could be predicated upon Section 23.

It seems clear that except for Sections 60b, 67e, and 70e, all dealing with suits by trustees, that Section 23 was intended by Congress as an exclusive treatment of controversies cognizable by courts of bankruptcy. In *Schumacher* v. *Beeler*, 293 U. S. 367, this court said at page 374:

"In enacting Section 23, it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of Section 2 of the Act of 1867. The purpose was to leave such controversies to be heard and determined for the most part in the state courts 'to the greater economy and convenience of litigants and witnesses.' But no reason appeared for a denial of

jurisdiction to a federal court if the defendant, the adverse claimant, consented to be sued in that court. * * *"

(The consenting defendant referred to is, of course, a defendant in a suit brought by a trustee.)

Conceivably it might be argued that since the statute refers to cases in which trustees are parties, that the bankruptcy court may have some broader jurisdiction with respect to controversies arising out of a bankruptcy to which the trustee is not a party. However, the fallacy of such an argument becomes apparent when considered in the light of the above-indicated purpose of Congress to limit the bankruptcy jurisdiction, and in the light of the logical improbability that Congress should intend to confer a broader jurisdiction in the absence of, than in the existence of a trustee, and in the light of the extremely limited powers of receivers in bankruptcy:

"(3) appoint receivers or the marshalls, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;"

United States Code, Title 11, Chap. 2, Sec. 11, (3).

The more logical conclusion to be drawn from the fact that provision is made only for controversies to which the trustee is a party, is that the Congress contemplated and intended that there might be such controversies, *only* when there was a trustee. There had been no trustee appointed in the present case as there had been no adjudication, and hence there could be no jurisdiction at all.

Assuming, however, solely for the sake of argument, that the term "trustee" as employed in Section 23 could by some possibility be metamorphosed into "representative of the estate", it would still follow that there could be no jurisdiction in the bankruptcy court. If Section 23a be sought to be invoked, it provides that the "District Courts shall have jurisdiction * * * in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." It is clear that under such circumstances the District Court would have jurisdiction only if there were a diversity of citizenship, federal question, or some other independent ground of federal jurisdiction. It is, of course, nowhere even suggested that any such independent ground of federal jurisdiction exists.

If the consent provision of Section 23b be sought to be invoked, respondents are equally frustrated. Section 23 (b) refers only to proceedings brought *by* trustees, and not to proceedings *against* them. This court said in *Schumacher* v. *Beeler*, 293 U. S. 367, at the bottom of page 374:

> "* * * Exercising that power, the Congress prescribed in Section 23 (b) the condition of consent on the part of the defendant sued by the trustee. Section 23 (b) was thus in effect a grant of jurisdiction subject to that condition."

A controversy brought against a trustee or "representative of the estate" would be subject to the requirements of Section 23 (a), and would so require independent grounds of federal jurisdiction, unless it were a reclamation proceeding, in which event the jurisdiction of the bankruptcy court would lie without reference to the bankruptcy act and would arise from the *actual* pos-

session of the bankruptcy court, and from the fact that it alone could enable such complaining party to secure the property he claims. (The theory of such reclamation jurisdiction is treated later in this brief at page 30.)

The law is well settled that where an adverse claim is disclosed, the court has no jurisdiction to determine a controversy in a summary manner or proceeding. That there was such an adverse claim seems too clear to be disputed. One of the dominant elements in this entire case, and one to which the courts below have simply closed their eyes, is that this was an *escrow* and not a mere agency. Escrowees are trustees; not mere agents.

In the case of *Seibel* v. *Higham*, 216 Mo. 121, 132; 115 S. W. 987, the court said:

> "* * * The depositary of an escrow is sometimes spoken of as an agent of the grantor and sometimes as the agent of both parties, and whilst that may be correct, in a limited sense, yet strictly speaking he is not an agent at all, he is a trustee of an express trust, with duties to perform for each which neither can forbid without the consent of the other. If he were the agent of the grantor his agency would cease on the grantor's death and he would have no authority to receive the purchase money from the grantee and deliver the deed. But the death of the grantor does not annul the depositary's authority to do what he was appointed to do and it does not impair the right of the grantee to perform the condition and take down the deed. * * *"

It may be conceded, the fact that the letter controlling the fund referred to it as an escrow, and that all parties referred to it as such, is not necessarily conclusive that it was such in fact; but there can be no doubt that it was an escrow when the surrounding circumstances are considered. Had the money been held

merely by agents and not by escrowees or trustees, there would have been no purpose in having such a fund at all. If no one was intended to be given any interest in the fund other than the depositing contractors, why was not the money left in the individual bank accounts of the individual depositors? Obviously the money was held by the escrowees as trustees subject to rights of themselves and third parties. What these rights were does not appear clearly from the record, since there was no hearing concerning them, as hearing on the merits was denied. However, *what* they were is not important; what matters is *that they existed*. That one of these rights was a right of Odell to compensation would have been shown had opportunity been so given, is demonstrated hereafter. (Brief 52.) Actually the present proceeding is one for an accounting. Certainly no argument is required to show that an accounting suit against a trustee is an adverse proceeding. This proceeding should have been brought by complaint in chancery in the State Court.

The intervening petition constituting neither a proceeding in, nor a controversy arising out of, bankruptcy, authorizes no jurisdiction for the court.

3.

The escrowees were not agents for the alleged bankrupt nor were they subject to its control.

The decision of the Circuit Court of Appeals on the point of jurisdiction was based primarily on the theory that the alleged bankrupt had possession and custody of the fund in litigation, which is in turn founded upon the idea that Craig and these petitioners (the three escrowees) were mere agents of the alleged bankrupt.

Hence, the question of whether or not these escrowees were agents and under the control of the Tax Service Association becomes of paramount importance.

It is axiomatic that a principal can remove and replace an agent unless the agency is coupled with an interest.

Respondents contended (Rec. 28) and the Circuit Court of Appeals has found (Rec. 132) that none of the escrowees had any interest in the fund. Hence, under the law enunciated and their contention, the respondents and the Circuit Court of Appeals are forced to the fallacious position that the Tax Service Association could have removed and replaced any of the escrowees at will—that the Tax Service Association could have appointed other escrowees the day following the establishment of the escrow and caused the funds to be transferred to the account of the association itself. Would respondents or the Circuit Court of Appeals seriously attempt to support such a position as this in view of the letter controlling the escrow (Rec. 27) which specifically designated alternates (thus by implication excluding any other mode of selecting alternates), and more especially in view of the general situation and of the ordinary manner in which sensible business men conduct their affairs.

It is clear that Craig was designated as one of the escrowees primarily for assurance against any possibility of control of these funds without the approbation of the contractors who had deposited them. Craig was a secretary of the Building Construction Employers' Association of Chicago, a master association comprising lesser associations of one or more of which each of the contractors was a member. (Rec. 24.) The interveners allege that in the escrow matter Craig, Harris, and Odell, were acting as representatives of the interveners and

of their various associations. (Rec. 28.) Craig's answer states: "* * * that he was not acting at any time as the agent or representative of and had no connection with the Tax Service Association of Illinois."

It is interesting to note in connection with the allegations of the interveners' petition, and in connection with the subsequent desperately devised contention of the interveners; that the escrowees or some of them were agents of the alleged bankrupt, that the interveners allege under oath that they "requested Benjamin F. J. Odell to cease from acting as attorney or representative of the petitioners", (respondents), (Rec. 31), and that they "requested R. G. Harris to cease from acting for or representing any of the petitioners" (respondents). (Rec. 32.) It is significant that at that time, before they realized the jurisdictional demands made upon their "facts", they regarded Harris and Odell, as well as Craig, as *their* representatives, or more accurately trustees.

In the case of *Seibel* v. *Higham*, 216 Mo. 121, 132; 115 S. W. 987, the court said:

> "* * * The depositary of an escrow is sometimes spoken of as the agent of the grantor and sometimes as the agent of both parties, and whilst that may be correct, in a limited sense, yet strictly speaking he is not an agent at all, he is a trustee of an express trust with duties to perform for each which neither can forbid without the consent of the other, * * *."

While it may be argued that Harris was an officer of the alleged bankrupt, it cannot be disputed that he was acting in his own individual capacity as trustee of the escrow fund. See: *St. Paul's Episcopal Church* v. *Fields*, 81 Conn. 670, 72 Atl. 145. *Bowman* v. *Brown*, 87 N. J. Eq. 47 at 48. 99 Atl. 839. Although petitioners

were given no opportunity to be heard on the facts with respect to the relations of the various parties, it seems inconceivable that a fair-minded person could draw from the present record any conclusion other than that the three escrowees were trustees, and not agents of the alleged bankrupt.

4.

There was neither actual nor constructive possession within the meaning of such terms as used by the authorities.

Overlooking solely for the purpose of argument the fact that the present controversy does not relate to the estate of the bankrupt, it is submitted that there was no such possession as would support the jurisdiction of the bankruptcy court, nor was the property of such character as could be "possessed" in this sense.

Here the property was not in the custody or control of the receiver, as evidenced by the fact that on June 3rd, 1937, (seven days after the "agreed" order), the receiver filed a petition asking that part of the funds be held until adjudication. (Rec. 53.) Obviously such request would have been unnecessary had there been possession or control by the court's officer.

The contention of respondents that there was possession predicated upon the assumption that the three escrowees were agents of the alleged bankrupt falls, of course, with the demonstration above made of the fallaciousness of that assumption.

In the case of *Buss* v. *Long Island Storage Warehouse*, 64 Fed. (2d) 338, 340, the bankruptcy court laid down the doctrine that where possession by an agent of the bankrupt is relied upon as the basis of summary jurisdiction, the agent and the property must be *uncondition-*

ally subject to the bankrupt's orders. The Court said on page 340:

> "* * * As we have said, the underlying notion is that for jurisdiction to attach, the bailee must be unconditionally subject to the bankrupt's orders * * *"

See also *Sproul* v. *Levin*, 88 Fed. (2d) 866 (C. C. A. 2).

In the case at bar, there was certainly no unconditional control granted the bankrupt over the escrow fund. As a practical matter, even if Harris had been its agent, the bankrupt could have exercised no domination whatever over the fund without the written consent of both Craig and Odell. No one or two escrowees controlled the fund. (Rec. 27.) This utter lack of possession or control of the fund by Harris, let alone the alleged bankrupt, was completely overlooked by the Circuit Court of Appeals.

It is further submitted that the funds were of such a character that they were not property even *capable* of being in the possession of the bankrupt or its agents. Assuming that there had been a bankruptcy trustee as distinguished from a receiver who gets no title and consequently is unable to maintain a proceeding, the most that would have inured even to such trustee would have been a mere chose in action. It is clear that the relationship between the depositary bank and the escrowees is that of debtor and creditor, and hence all that the escrowees had was a mere chose in action. It is equally apparent that any claims against them with respect to this escrow, including any claim which the alleged bankrupt might have, could not be more than a chose in action. The liquidation of such chose in action would necessarily require extensive litigation, and the determination of many complicated questions of law and fact.

A chose in action is not property which may be in the possession of a bankruptcy trustee, so as to support jurisdiction.

Board of Trade v. *Johnson*, 264 U. S. 1.
Kelley v. *Gill*, 245 U. S. 116.

The tenor of these last two cases is well indicated by the following language which appears on page 121 of the *Kelley* case:

> "Nor can the jurisdiction of the court of bankruptcy be maintained on the ground that this is a suit brought to determine a controversy concerning property in the possession of the trustee. He had possession merely of contested claims against alleged stockholders. * * *"

In the case of *In re Roman*, 23 F. (2d) 556, page 558, the Court said:

> "* * * The trustee must proceed as the bankrupt must have proceeded, in a court having competent jurisdiction in such causes. This was clearly the distinction which the court had in mind in *Board of Trade* v. *Johnson*, 264 U. S. 1; 44 S. Ct. 232, 68 L. Ed. 533, where the decision turned entirely upon whether a seat in a trading exchange was property or a chose in action, and where the decision depended upon the view that it was property. Where procedural questions are at stake, such differences go to the essence, and we could not affirm the order without vesting in the bankruptcy court power summarily to try actions in contract, at least so far as to decide whether the defense is real."

As is clearly stated in Remington on Bankruptcy, Vol. 5, Fourth Edition, paragraph 2368, page 566:

> "Mere rights of action for money judgments or decrees in *personam*, and for debts owing to the bankrupt, etc., where no tangible property is involved, cannot well be said to constitute property

in the bankrupt's possession at the time of bankruptcy and therefore it would seem that the bankruptcy does not necessarily draw litigation, in relation thereto, into the forum of the bankruptcy court, although, of course, the bankruptcy court may issue injunction for the protection of contract rights. * * *"

It thus being demonstrated that the bankruptcy court had neither actual nor constructive possession of the funds in question it could not take jurisdiction of the intervening matter upon any possessory theory.

5.

Mere constructive possession is not sufficient to confer upon the bankruptcy court jurisdiction over a reclamation suit.

"Reclamation" proceedings are summary proceedings brought by third persons *against* the trustee to recover property wrongfully in the possession of the trustee. A "turnover" proceeding is a proceeding *by* the trustee to compel the bankrupt or a third party to "turn over" to the trustee property definitely in possession or under control of the bankrupt. Conceding, solely for the sake of argument upon this point, that the facts would have sustained jurisdiction of a "turnover" proceeding by the trustee (had there been a trustee) to reach the property for the benefit of the estate, still the facts would not sustain jurisdiction for a reclamation proceeding.

The reasoning of the Circuit Court of Appeals, and their construction of the case *Page* v. *Arkansas Natural Gas Corporation*, 53 Fed. (2d) 27, was directed to the proposition that something less than *actual* possession of the property in litigation was sufficient to sustain jurisdiction. The Circuit Court of Appeals, in concluding that

the funds in litigation were "so closely connected with its [bankrupt's] affairs", assumed that constructive possession was sufficient to sustain jurisdiction. Conceding the accuracy of the proposition that constructive possession is sometimes sufficient to sustain jurisdiction, nevertheless its application is limited to "turnover" proceedings, or proceedings in the nature of "turnover" proceedings brought by the trustee for the benefit of the estate. All cases sustaining the above proposition are not "reclamation" proceedings, but "turnover" proceedings. It is true that the case principally relied upon in the opinion of the Circuit Court of Appeals, *i. e., Page v. Arkansas Natural Gas Corporation* started out as a reclamation proceeding. However, the relief appealed from was granted upon the trustee's cross petition, which was clearly in the nature of a "turnover" proceeding, *i. e.*, to compel the execution of a quit-claim deed to the trustee.

On the other hand, with respect to reclamation proceedings, it is observed that *actual* as distinguished from *constructive* possession is not only contemplated, but indispensable for the jurisdiction. "Reclamation" proceedings have been evolved for the purpose of permitting a third party claiming property to recover the same from the actual possession of the bankrupt, his receiver, or trustee. When property is in the actual possession of the bankrupt, receiver, or trustee the only way to recover it is by a reclamation proceeding. Where, on the other hand, the possession of the trustee is merely constructive, as where for example, the property may have been removed without proper authority from the estate of the bankrupt, but is actually in the possession of a third party, other than the rightful owner, a reclamation proceeding would not only be unnecessary, but would not be

the normal remedy. The normal remedy then would be a replevin suit or other appropriate direct proceeding in an ordinary court of law or equity against the party actually in possession of the property.

There are a number of cases which hold that under the factual situation above outlined, *i. e.*, where property has been wrongfully removed from the possession of the bankrupt, that such property is in the constructive possession of the trustee, and may be recovered by him in a "turnover" proceeding conducted in the bankruptcy court. Obviously, "turnover" proceedings are proper to recover property in the *constructive* possession of the trustee; there would ordinarily be little occasion for such proceedings, however, where the property was in his actual possession.

A further broad distinction relevant to the facts of the present controversy exists between "turnover" and "reclamation" procedings. The former are always brought for the benefit of the estate; the latter, for the benefit of the third party instituting the same. There is every reason logically and legally why the constructive possession fiction should be indulged to confer jurisdiction upon a court of bankruptcy of a proceeding which benefits the creditors, the parties primarily sought to be benefited by the creation of such courts; there is very little reason, if any, why such a fiction should be indulged for the purpose of assuming jurisdiction to assist third parties, for the benefit of whom such courts were not created. Where the court has actual possession through its officers, no fiction is involved. Allowing reclamation proceedings under such circumstances constitutes no more than plain, fair dealing on the part of the court in turning over to such claimant property rightfully belonging to him, from the courts own possession.

The true basis of reclamation proceedings is aptly enunciated in *Murphy* v. *Hofman, et al.,* 211 U. S. 562, 568-9:

> "* * * But where the property in dispute is in the *actual* possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co.* v. *Adelbert College* 208 U. S. 38, 54. * * *"

Reclamation proceedings have developed by analogy to the law of replevin, it has been held that a reclamation proceeding cannot be maintained except under those circumstances and upon proof of those facts which would be necessary to maintain replevin or trover.

> Remington on Bankruptcy, 4th Ed., Vol. 5, Paragraph 2451, page 710; citing *Levi* v. *Picard,* 148 Fed. 654.

Inasmuch as the subject matter of the present controversy is merely a chose in action, it is obvious that neither replevin nor trover would lie here. See: *Spear* v. *Arkansas Bank,* 111 Arkansas, 29.

> "The right to reclaim exists only where the relation is that of bailor and bailee, not that of debtor and creditor."
>
> Brown's Guide to Federal and Bankruptcy Practice (1933), Par. 290, page 207.

Hence, it follows that the instant facts cannot possibly sustain a reclamation suit.

Thus the present controversy cannot be sustained as a reclamation proceeding because there was no actual possession of the property in the bankrupt.

6.

The petitioners did not in fact consent to the jurisdiction of the bankruptcy court.

Assuming that jurisdiction could be conferred by consent, it follows that such consent must be actual and not merely colorable. Such consent must represent a state of mind and not a mere metaphysical technicality. While it is true, of course, that a state of mind must be determined from overt acts, and that intention with respect to a written instrument must be gathered primarily from the language used, yet it is clear that such overt acts and such language must be construed and evaluated as a whole, and against the background in which they occur. Such intention is not to be determined merely from one overt act or one phrase where such act or phrase is clearly contrary to the actual intention of the parties as demonstrated by an entire course of conduct or written instrument as assessed against its background. Particularly is this true where as in the present case one party intentionally and deliberately attempts to make it appear that there was waiver of objections to jurisdiction when in fact all parties understood that there was no such waiver. (Rec. 93-4.)

No other fact in this case is quite so clear as that from the ne petitioners were brought into this proceeding, both before the court, before the referee, and in

discussions out of the presence of the court, petitioners staunchly and consistently denied the jurisdiction of the court.

It is submitted that the so-called "agreed" order was entered under the worst type of coercion and compulsion to which conscientious parties, subject to a sacred trust, can be subjected. The Avery Brundage petition was filed on May 24, 1937. June 1, 1937, was the "deadline" for the payment to the Illinois State Department of Finance of taxes from the escrow fund in order to avoid the imposition upon and accrual to the interveners of heavy penalties in excess of $100,000. This fact was known to all parties concerned. Immediately upon the filing of the Avery Brundage petition, these petitioners took the position that the court was utterly without jurisdiction to entertain the same. This fact also was known to all parties. Petitioners were deeply cognizant of the duty which they owed to the beneficiaries of the Sales Tax Escrow Fund, and of the urgency of release of the 75% of this $314,000 fund by June 1, 1937. All parties were agreed that such funds should be released; however, they were not agreed upon the mode of their release. The attorney for the interveners (now for respondents) insisted upon an agreed order; the court refused to authorize the disbursement except upon such agreed order.

The nature of the duress practiced here could well be likened to the situation of a man with a jewel on the brink of a cliff threatening to cast the stone into the sea below unless his exactions of a promise be complied with by the owner of the precious gem. The promise made under duress, to save the jewel, cannot be enforced.

The funds would have been largely destroyed by imposition of heavy penalties unless 75% of the funds could

have been disbursed promptly. The attorney for respondents here knew well the necessity for such disbursement, and deliberately "tied up" such funds, to prevent disbursement except upon his own terms one of which terms was these petitioners sign the so-called "agreed" order.

The intervention into the bankruptcy proceeding was so audacious and unprecedented that the court felt the need for additional time to consider the question of its own jurisdiction. That the court doubted its own jurisdiction even then is aptly indicated by the language of the Circuit Court of Appeals:

> "* * * It would seem the court, at that time, might have been somewhat dubious of the situation, as each party in interest, either personally or by attorney, was required to and did approve said order in writing." (Rec. 132.)

Inasmuch as Craig, the third escrowee, and the National Builders Bank had also been made parties to the intervening petition, and were unwilling to take a chance and disburse the funds without an order of the court, it is obvious that such disbursement could not be made without that order. It is now clear that the bankruptcy court then in fact had no jurisdiction. Hence, it follows that the restraint imposed upon the disbursement was wholly without authority. The duress thereby imposed vitiated any apparent consent to the jurisdiction. That duress may be imposed by the unauthorized assumption of jurisdiction can hardly be questioned. When a judge assumes to entertain a proceeding over which he is utterly without jurisdiction, he is acting as any other private person and not as a court. The mere fact that the judge was honestly mistaken and was unwittingly imposed upon by counsel for respondents in the pursuance of his devious plans, and as a result of such mistake allowed the petition to be filed, is of course immaterial.

The foregoing is based upon the assumption that petitioners did purport to consent to the jurisdiction of the court in the so-called "agreed" order. An examination of the "agreed" order, however, discloses that even this assumption is unfounded.

To what did petitioners agree? They agreed that the "court" had "jurisdiction to enter this order." What jurisdiction was required "to enter this order"? To answer this question it is necessary to determine the effect of the order. Its sole and total effect was merely an authorization by the court to your petitioners, to Craig, and to the bank, to disburse 75% of the funds. It was merely permissive, and had no mandatory force or effect.

While it may be contended that jurisdiction to dispose of the balance of the fund was approved because the order provided "that the balance of the money in said Sales Tax Escrow Fund * * * shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago subject to the further order of this court", it is believed that slight consideration will indicate this language was wholly nugatory. The language certainly does not indicate consent to any change in the status of the escrow fund or in the quantum of control or jurisdiction of either individuals or court over it. The language is that the balance "shall *remain* and be held * * * subject to the further order of this court," not that it shall *become* subject. Certainly "remain" indicates continuation of the existing situation, *i. e.*, that it "shall remain * * * subject" to the order of the court in the sense that, and to the extent only that, it was "subject" before the order was entered, *i. e.*, that the escrowees and the bank could not disburse the balance until the court made a further order. Was not the fund "subject" to the order of the court in this sense prior to the entry of the agreed

order? Certainly the bank, to say nothing of the escrowees, would not have permitted the funds to be withdrawn in the face of the intervening petition without some court order.

It must also be noted that the provision was that the balance of the fund should remain subject to the further "*order*" of the court; not that it should be subject to the *jurisdiction* of the court. An order of the court dismissing the intervening petition for want of jurisdiction would constitute such further "order".

It was just such an order which the court should have made. At the time the "agreed" order was entered, all parties anticipated and understood that such "further order" should be an order determining the question of jurisdiction. At the time of the entry of the order, it was insisted by these petitioners and agreed in open court that the consent requested by the court to such distribution would not prejudice their rights to have determined the question of the jurisdiction of the court over the 25% balance of said fund (Rec. 93-94, 62). That the court so understood the agreement is evidenced by the fact that the order itself gave these petitioners the right to file "their answer *or other pleadings* to said petition (Avery Brundage or first petition,) * * * to and including June 3, 1937." What is meant by "other pleadings"? Clearly the expression as herein used is broad enough to include, and was intended to include, pleas to the jurisdiction.

The agreement reserving the right to object to the jurisdiction was urged upon the trial court in the exceptions filed to the referee's report in the following language:

"* * * It was at the solicitation and suggestion of the court that said 75 per cent of the funds were

distributed to the Department of Finance for the various petitioners in order to avoid a penalty against said petitioners for failure to pay said taxes within the allotted time, and it was stated by respondents and agreed to in open court that the consent requested by the court to such distribution would not prejudice the rights of respondents to have determined the question of the jurisdiction of the court over the 25 per cent balance of said funds." (Exceptions to referee's report (Rec. 93-94).)

That there were such agreements and understandings that objections to the jurisdiction should not be waived by consent to the so-called "agreed order" is evidenced by the following language from the report of the referee in the bankruptcy matter, (Rec. 62):

"Attorney Sigmund W. David of the law firm of David & Fainman, which law firm had filed the so-called Avery Brundage Company, *et al.*, petition, stated at the hearing before me that, in fairness to the attorney for the alleged bankrupt corporation, he thought he should state that it was the understanding between Attorney Flaherty (attorney for the receiver), the attorney for the alleged bankrupt corporation and himself that the so-called Avery Brundage Company, *et al.*, order was entered subject to the then pending motions of the alleged bankrupt corporation to quash the service. He further stated that the original draft order which he drew said something about it, but it was thought unnecessary, as it was felt that the order in relation to the so-called Avery Brundage Company, *et al.*, petition would not affect the then pending motion of the alleged bankrupt corporation on the question of service and jurisdiction."

A somewhat similar situation arose in the case of *Frank* v. *Vollkommer* decided by this court in 205 U. S. 521. There the parties agreed to the sale of certain property by the bankruptcy receiver and agreed that the proceeds be deposited in a bank *"there to await the further order of the court."*

In subsequent litigation in the State Court it was argued that there was no jurisdiction in the State Court because the propery was in the custody of the bankruptcy court. This court, upon appeal denying that contention, said on page 528:

> "The contention is wholly inadmissible. The mortgaged property consisted of horses, vehicles, harness, etc., and the order of sale of the temporary receiver, agreed to by plaintiffs in error, was evidently in the interest of all parties, and provided for the deposit of the proceeds, not in the general funds of the estate, but as a special fund, to which the lien, if any, of the chattel mortgage was transferred, and clearly contemplated a plenary suit to determine the validity thereof, which, at that time, there being no diversity of citizenship, and no such possession as might lead to a different result, could only be commenced in the state court. * * *"

Thus it is demonstratd in case at bar that no actual consent to the jurisdiction of the court was given.

7.

Consent cannot confer jurisdiction of the subject matter, i. e., jurisdiction on the bankruptcy court of a controversy between strangers to the bankruptcy proceeding.

In the early case of *Olds Wagon Co.* v. *Benedict*, 67 Fed. 1, 5 (C. C. A. 8, 1895), the court used language now universally concurred in by the courts:

> "* * * No consent, agreement, or estoppel can confer jurisdiction upon a federal court to hear or determine any case in which the essential jurisdictional facts do not appear from the record. These rules are fundamental. They are settled by repeated adjudication of the Supreme Court, * * *"

In the case of *Nixon* v. *Michaels*, 38 Fed. (2d) 420, above discussed, a case in which the facts were almost identical

with case at bar, the court used the following significant language on pages 422, 423:

"(2) The question of jurisdiction was not raised directly in the court below; nevertheless, it is the duty of this court to determine the question. *M. C. & L. M. Ry.* v. *Swan*, 111 U. S. 379, 382 * * *; *C. B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419, * * *; *B. & O. R. Co.* v. *City of Parkersburg*, 268 U. S. 35, * * * *Highway Const. Co.* v. *McClelland*, 14 F. (2d) 406 (C. C. A. 8)."

"(3) A District Court of the United States sitting as a court of bankruptcy is a court of limited jurisdiction. Limitations exist as to subject matter; as to territory; as to the residence and occupation of the debtor to be adjudicated; as to the status of the corporation or person to be adjudicated; and as to other matters. Remington on Bankruptcy (3rd Ed.), c. III. And consent cannot confer jurisdiction over subject matter. The express provisions of the statute and the necessary implications are controlling. Id. p. 66; *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 535, * * *; *Henrie* v. *Henderson* (C. C. A.), 145 F. 316, 320; *Nelson* v. *Svea, etc., Co.* (D. C.), 178 F. 136, 140; *In re Hollins* (C. C. A.), 229 F. 349; Id. (C. C. A.), 238 F. 787; *Jones* v. *Kansas City, etc., Co.*, 1 F. (2d) 649 (C. C. A. 8); *In re Judith, etc., Co.* (C. C. A.), 5 F (2d) 307."

The United States Supreme Court has consistently held that lack of Federal jurisdiction cannot be cured by consent.

"Third. Unlike an objection to venue, lack of Federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review. * * *"

Mitchell v. *Maurer*, 293 U. S. 237, 244.

Flanders v *Coleman*, 250 U. S. 223, 228.

Hancock v. *Holbrook*, 112 U. S. 229, 231.

Mansfield, etc. Railway v. *Swan*, 111 U. S. 379, 382-4.

That the bankruptcy court did not have jurisdiction of the subject matter, has been demonstrated. The courts have held that federal grounds of jurisdiction must appear on the face of the pleadings and not upon matters which may subsequently develop in the course of the trial.

Mosher v. *City of Phoenix*, 287 U. S. 29.
Barnett v. *Kunkel*, 264 U. S. 16.
Flanders v. *Coleman*, 250 U. S. 223.
Press Publishing Co. v. *Monroe*, 164 U. S. 105.
Hanford v. *Davies*, 163 U. S. 273.
Oregon Short Line Ry. Co. v. *Skottowe*, 162 U. S. 490.
Dowl v. *Applegate*, 152 U. S. 526.
Colorado Central Mining Co v. *Turch*, 150 U. S. 138.
Metcalf v. *Watertown*, 128 U. S. 586.

What jurisdictional facts are required in the federal court? In law and equity suits allegations of requisite amount involved, diversity of citizenship, or other grounds of federal jurisdiction are imperative. Failure to allege these requisites has been held fatal. In a bankruptcy proceeding the allegations should specifically state the grounds upon which the jurisdiction of the court is invoked.

The requirements of a petition for reclamation are aptly stated in *Loveland on Bankruptcy*, Vol. 1, Page 853:

> "The intervening petition should state the date of filing the petition in bankruptcy, the adjudication, the appointment of the trustee or receiver, and that the property in question is in the possession of the trustee or receiver as a part of the bankruptcy estate."

It is significant that *neither petition* in case at bar contains an allegation of the fact that a petition in bank-

ruptcy had been filed against the alleged bankrupt. It contains neither the date of the petition in bankruptcy, the date of the appointment of the receiver, nor statement whether or not there are sufficient creditors; it is bare of any allegation with respect to the fact of adjudication, or lack of adjudication. (There had been no adjudication.) A stranger reading the petition would have no conceivable means of knowing that a bankruptcy proceeding was pending. Strangers were made parties to the proceeding,—the bank, E. M. Craig, Benjamin F. J. Odell and Roy G. Harris. It contains no allegations of diversity of citizenship, nor any other facts which might support jurisdiction.

The Statute is clear:

> "If in any suit commenced in a District Court, * * * it shall appear to the satisfaction of the said District Court at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case cognizable * * * under this chapter, the said District Court, shall proceed no further therein, but shall dismiss the suit * * *, as justice may require, and shall make such order as to costs, as shall be just."
>
> United States Code, Title 28, Chap. 3, Sec. 80.

Even though the petition contained allegations sufficient to sustain its filing in the bankruptcy court, with reference to the existence of a bankruptcy matter, still petitioners contend that the intervening petition is fatally defective. In neither the first nor the second petition is there any allegation that the funds were in the custody and control of the bankrupt. On the contrary the first petition reveals that the funds were under the control

of Craig, Harris and Odell (Rec. 27). Respondents state that they requested Odell to sign a check, but that he refused, and that the same request was made of Harris (Rec. 31-3). They requested both Harris and Odell to cease from acting as their representative or agent (Rec. 31-3). They say that respondents need the money to pay the sales tax. No offer is made to do equity, to pay Odell for his services as an attorney covering two years of complicated and protracted litigation, but they say that neither Harris, Odell, Tax Service, nor anyone else is entitled to any of the money (Rec. 28). The prayer is not that the Tax Service turn over the money in the fund, but that three strangers to the proceedings sign a check upon a bank which likewise is a stranger to the proceeding, and make the check payable to three other strangers. Such a bill would have been fatally defective in any proceeding.

Defective as the first petition may have been, the second petition, the one relied upon here in this controversy, presents not a single ground of bankruptcy jurisdiction. We challenge respondents to point out to the court a single allegation which states either directly or indirectly that the funds were subject to the control of the alleged bankrupt. Not one valid reason is presented why the bankruptcy court should assume jurisdiction to enter the orders appealed from.

The law is too well settled for dispute that to justify the stringent demands of the Statute above quoted an absence of any of the allegations of jurisdiction from the pleadings makes it mandatory for the District Court to dismiss the cause of action. The Court should have looked beyond the ill-concealed attempt of respondents to transform a petition in equity into a bankruptcy controversy, by merely filing it in the bankruptcy court and

without alleging any facts which would justify the court in determining the question. If the jurisdiction be sustained, no logical reason exists why a divorce action, for instance, could not be similarly prosecuted in a bankruptcy proceeding. The mere fact that a bankrupt entered into a contract with certain associations, and that its vice president happened to be one of three escrowees of certain funds, does not license the bankruptcy court to hear and determine disputes with reference to the amount of taxes escrowed by numerous individuals.

Consent cannot confer upon courts powers withheld by statutes and the constitution. Consent cannot transform an ordinary bill in equity into a bankruptcy controversy.

In *Metcalf* v. *Watertown*, 128 U. S. 586 at 589, this Court said:

> "* * * Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, *at the time its jurisdiction is invoked, could properly take cognizance.* If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind. * * *" (Italics ours.)

In the case of *Barnett* v. *Kunkel*, 264 U. S. 16 at page 19-21 we find:

> "No question of our jurisdiction to hear this appeal is raised by the appellees. That, however, does not relieve us from the duty of inquiring into it. * * * The complainant in deraigning his title disclosed the fact that it rested on the allotment of the land in question to a deceased Creek Indian minor, that the land was inherited by the minor's mother and was conveyed by that mother as a full blood Creek Indian with the approval of the County Court, all in accordance with and by virtue of a law of Congress; but there was nothing to show on the face of the bill that the validity of this conveyance was questioned under that law. The averment that the defendants were asserting a conflicting title or interest did not show that the issues which the assertion of their claims would present for trial, would necessarily involve the validity of the conveyances made under and by virtue of the Federal law, any more than the legal sufficiency of the many other conveyances set forth in the bill in the chain of complainant's title. It is true that the issues made by the answer clearly involved a consideration and construction of the effect of the Federal Statute of May 27, 1908. And perhaps others, but that fact subsequently developed would not furnish a ground for jurisdiction of a Federal District Court. In *Florida Central R. R. Co.* v. *Bell*, 176 U. S. 321, (p. 327), is was said:
>
> "It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiffs' statement of their case."
>
> "* * * nothing of this kind appeared in the bill, and the development of the real Federal issues in the answer or on the trial could not supply the defect in the original jurisdiction of the suit as one arising under the laws of the United States."

This court said in: *Flanders* v. *Coleman* (a bankruptcy controversy), 250 U. S. 223 at 227:

> "Whether the District Court has jurisdiction to

grant any relief must be determined upon a consideration of the allegations of the bill and the amendment thereto. * * *"

And on the bottom of page 228:

"The opinion of the District Court shows that it really considered the merits of the case in reaching the conclusion that it was without jurisdiction. As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which Federal jurisdiction is invoked."

Therefore, consent cannot confer jurisdiction of the subject matter where no grounds of federal jurisdiction appears from the record.

Point II.

The orders appealed from deprived petitioners of property without any opportunity whatever to be heard on the merits of the issues.

"Every litigant, of course, is entitled to an opportunity to be heard upon the merits of a suit to which he may be a party or interested."

Thus the Circuit Court of Appeals concedes petitioners' right to a hearing (Rec. 133). It could not, of course, do otherwise in view of the due process clause of the Fifth Amendment to the United States Constitution. Yet, although paying lip service to this principle, the Circuit Court of Appeals affirmed the orders of the District Court which denied petitioners their right to be heard, and thus the effect of the decision of the Circuit Court of Appeals is in and of itself a denial of that "due process" which the Fifth Amendment guarantees.

It is earnestly submitted that the right to be heard as

guaranteed by the constitution is a right of substance and not a mere technical right of which an honest litigant may be deprived by a technical contrivance amounting to little more than judicial chess.

From time immemorial the idea has been ingrained in the Anglo-American system of pleading that a party has the right to plead to the jurisdiction first, and subsequently, plead to the merits; that a party may refrain from pleading to the merits until questions of jurisdiction have been disposed of. This principle is so strongly instilled in our system of jurisprudence that, in the absence of statutory modification, a plea to the merits constitutes a waiver of jurisdictional objections, as concerns those objections which can be waived at all. In all events, it is beyond dispute that the Federal Equity Rules and General Orders in Bankruptcy under which the District Judge was proceeding, and by which he was bound, contemplate that a defendant or respondent in a bankruptcy court may plea to the jurisdiction, and shall have five days after such plea has been overruled within which to file his plea to the merits.

Rule 29 for Courts of Equity of the United States concludes as follows:

> "• • • If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."

Rule 37 of Rules in Bankruptcy is as follows:

> "In proceeding in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings in law, insti-

tuted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading and for taking testimony and publication, and may otherwise modify rules for the preparation of any particular case so as to facilitate a speedy hearing."

It is clear, of course, that this limited power of modification granted to the trial judge is not intended to include the right to deny a hearing. No "special order" or any other order for that matter, for time in which these petitioners could answer to the merits, was ever entered by the trial judge which purported to change the order of pleading contemplated by Federal Equity Rule 29. The Circuit Court of Appeals states:

"* * * On one occasion the court expressly directed them [the petitioners] to file an answer as to the merits, but this they refused or neglected to do." (Rec. 133.)

Doubtless the court here has reference to certain language contained in the order of June 29, 1937, which language when removed from its context might seem so to indicate, but concerning which more is said immediately hereafter.

On May 24, 1937, the first petition, the Avery Brundage intervening petition, was filed before the District Judge, sitting in Bankruptcy. On May 27, 1937, in an order agreed to by respondents, petitioners here were given until June 3, 1937, to file an answer "or other pleadings" to the said petition. On June 3, 1937, Harris filed a "Motion to Strike" the said petition for want of jurisdiction. On the same day Odell filed similar pleadings. No hearing was ever held on the petitions and motions to strike so filed.

On June 29, 1937, respondents abandoned the so-called Avery Brundage petition, having then found that they did not represent Avery Brundage Company, (Rec. 69-70), and substituted therefor the so-called Dahl-Stedman petition.

The motions to strike as previously filed, were permitted to stand to the second petition (Rec. 74). The latter petition, together with the motions to srike were referred to the referee the same day they were filed, June 29, 1937 (Rec. 73-5). That order of reference was limited solely to the question of jurisdiction (Rec. 75). Other issues then pending were not referred to the referee (Rec. 46-53). Notwithstanding the restriction on the referee to hear and report on the jurisdictional question only, he reported on the merits even without having any hearing whatever on the merits, and found the allegations of the second petition to be true (Rec. 78).

In his report the referee referred to certain sections in the order of reference (Rec. 84, 85) in which it appears that petitioners here were asked whether or not they desired to answer the second petition. The order recites they responded that they did not desire to answer said petition but asked that the pleadings to the first petition stand to the second petition, and to which the court consented. The order is misleading. The statement that they wished to be heard first on the jurisdiction before answering to the merits was evidently misconstrued as a waiver of their rights to be heard later on the merits.

The order of reference was obtained under most unusual circumstances. Sigmund W. David, attorney for the intervening petitioners, presented said order of reference to the court in the absence of all other counsel and without their approval, and copies of the draft order

were not given to other counsel until the day after it was entered (Rec. 92). That reference order falsely related that petitioners here had stated they did not desire to answer the petition. At no time did they say they did not desire to answer the petition or to be heard on the merits. To the contrary they sought hearing on the merits which the court denied over exception (Rec. 96).

On July 7, 1937, the referee's report was presented to the court recommending the signing of a check by your petitioners for some $48,580 and further recommending that the National Builders Bank of Chicago honor and pay the same despite the fact the matter had not been referred to the referee on the bank's answer and the bank had not been present at the hearing nor had there been any hearing on the merits concerning the bank's or anyone else's pleadings.

In their exceptions filed to the referee's report, petitioners set forth that the order of reference dated June 29, 1937, stated erroneous facts and that the order was presented to the court in the absence of other counsel; that petitioners were desirous of having their motions to the jurisdiction disposed of before they answered to the merits and that they did not waive their right to plead to the merits; that the erroneous portion of said order had misled the Special Master, or referee, and as his report indicated, furnished the sole reason for his recommending that the prayer of the intervening petition be granted without your petitioners being given an opportunity to be heard on the merits (Rec. 92).

Those exceptions set forth many reasons why the Special Master's report should not be approved and the court's attention is directed to them on pages 92 to 95 of the Record.

The trial court sustained the Special Master's report, erroneous as it was, and thereby deprived petitioners of their right to be heard in court on the merits of the issues.

Had the court not arbitrarily denied the motion to file answers to the merits, it would have been informed of the following facts: That the funds involved in the petition were subject to an attorney's lien, as Odell had not been paid for the services rendered the contractors for engaging him and for whom he had been eminently successful, (*Blome Co.* v. *Ames,* 365 Ill. 456, 459; see also *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600, 605); that intervener's petition was not actually the petition of all of the alleged interveners; that a liability existed if petitioners, as escrow officers or trustees, turned over the funds without special written request from each contractor or without an indemnity for so doing; that the contractors hired Odell by written contracts independent of the contract between trade associations and the alleged bankrupt, and that he is entitled to the wage of his hire; that there was an acceptance of the services of Odell and there was an express agreement to pay him; that there was an injunction in force in the State Court preventing distribution of the funds; (Rec. 169, 194); that on May 12, 1937, a restraining order of the United States District Court in this very case was entered in effect preventing the dissolution of the said injunction in the State Court and that it is still in full force and effect; (Rec. 195-6) that the further disbursing of said funds would be a violation of said injunctions; that there was no actual consent by petitioners to the jurisdiction of the court; that petitioners believe the intervening petitions were filed without authority and knowledge of many of the contractors for whom they purported to be filed; that other

contractors (not in this suit) have conflicting interests and rights in the fund. These and other important facts do not pass before the court for consideration upon a summary disposition of this cause on a mere jurisdictional plea, yet $48,580 involved was thus arbitrarily disposed of.

The portion of the opinion of the Circuit Court of Appeals dealing with the denial of the right to be heard on the merits, comprises only half a page, and with the indulgence of the court, we should like to set it out with our brief comments through the next few pages:

> "Every litigant, of course, is entitled to an opportunity to be heard upon the merits of a suit to which he may be a party or interested. * * * Appellants do not state, but intimate they have some interest in the funds in question. * * * If so, they should have asserted such claim." (Rec. 133.)

Petitioners submit that they have done everything humanly possible to assert such claim, but that right was denied them.

> "It cannot be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do." (Rec. 133.)

The Circuit Court of Appeals has here followed the trial court's misconstruction of, and the misleading language in, the order of June 29, 1937, a matter concerning which we have above commented at length.

> "Even as to the $20,000 remaining in the fund, they were given permission as to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of, had they so desired." (Rec. 133.)

Here the Court no doubt has reference to the motion of respondents filed July 13, 1937, after the order disbursing the funds had been entered, which motion asked that petitioners' objections to the jurisdiction be stricken, and that these petitioners be required to answer as to remaining funds; also to the order of court entered in accordance with this motion, and to the answer of petitioners filed July 30, 1937, in which they informed the court that an appeal was being perfected and asking not to be required to answer until the appeal was disposed of. Obviously, it was not the intention to waive the right to plead to the merits, but merely to postpone the exercise of that right until the question of jurisdiction was determined, a postponement evidently acquiesced in both by the court and respondents, inasmuch as no further proceedings have been had with respect to that motion.

> "What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record, they could have no interest or claim for services rendered in connection with the litigation in the matter of the sales tax, as the agreement betweeen appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without cost to appellees." (Rec. 133.)

Little additional comment is required here. One side of the story only has been heard. Some estimate of the reliability of that one version may be made from what does appear in the record.

For example, despite the fact that both intervening petitions are verified, the second admits that the first was false in stating that Sigmund W. David was authorized to act on behalf of Avery Brundage Company. (Whether or not he is authorized to act upon behalf of all or any of the others, petitioners here have had no opportunity

to call upon him to demonstrate by a hearing on the merits.) Further, George V. Dahl, the affiant in both the intervening petitions, verifies under oath a form of contract purported to have been entered into by Odell and various respondents. There is set out in the appendix hereto a copy of the true contract, a radically different one, entered into between Odell and Dahl-Stedman Company, which contract is signed upon behalf of that Company by the same George V. Dahl as president. There are a great many facts in connection with this case which petitioners have been denied the opportunity to present.

The position of these petitioners, free from the intentionally misleading appearance of refusal to plead to the merits, is rather simple. The intervening petition is filed; these petitioners pleaded to the jurisdiction of the court to entertain it. On the same day that their plea to the jurisdiction was overruled, petitioners asked leave to plead to the merits; this right was denied. This right to plead to the merits was one to which they were entitled not only under the General Orders in Bankruptcy and the Federal Equity Rules, but guaranteed to them under the Fifth Amendment to the Constitution.

Point III.

The Circuit Court of Appeals and the trial court committed further errors requiring reversal.

The trial court, seemingly with the approbation of the Circuit Court of Appeals, committed other errors in its rulings which deprived petitioners of that due process to which every litigant is entitled, and which errors require reversal. The attention of the court is respectfully directed to the fact that although the errors hereinafter treated were pointed out to the Circuit Court of Appeals,

and urged as grounds for reversal, yet the Circuit Court of Appeals took no cognizance whatever of them in its opinion as far as that opinion indicates.

1.

The court erred in entertaining an involuntary petition against a corporation organized not for profit.

A taxpayers association organized not for pecuniary profit, is not within the purview of the Bankruptcy Act:

> "* * * Any unincorporated company, and any moneyed, business, or commercial corporation (except a municipal, railroad, insurance, or banking corporation, or a building and loan association) owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, * * *."
>
> Title 11, Chapter 3, Section 22 (b) U. S. C. (Bankruptcy Act).

Inasmuch as the alleged bankrupt was a corporation "not for pecuniary profit" (Rec. 6, 9), and hence not a "moneyed, business or commercial corporation," the bankruptcy court had no jurisdiction whatsoever of the proceeding. It would follow from this that the court could not entertain an intervening petition with respect to a collateral controversy, the sole jurisdiction over which was predicated upon jurisdiction of the bankruptcy proceeding. Although the record does not disclose it, after denial of rehearing of this cause in the Circuit Court of Appeals, the Tax Service Association was adjudicated bankrupt; nevertheless the jurisdictional question over the subject matter is still subject to collateral attack.

2.

The court erred in determining an intervening controversy when its jurisdiction over the bankruptcy proceeding was in issue and undetermined.

The attention of the court is respectfully directed to the fact that in addition to the alleged bankrupt not being subject to the bankruptcy jurisdiction because not a "moneyed, business or commercial corporation", such alleged bankrupt had pleaded in good faith, contrary to the allegations in the petition, that it was not insolvent, and that it had committed no acts of bankruptcy.

It is submitted that the normal order of procedure for a court of bankruptcy having before it a petition for adjudication and collateral litigation, is to dispose first of the jurisdictional question of bankruptcy itself and to defer the determination of the collateral issue unless some good reason appears for a different order of proceeding. No such reason existed in the present case. To the contrary, justice urgently demanded the determination of the question of bankruptcy, whereas no reason whatever existed for hastening determination of the collateral issue which had existed in its present form more than two years—the time during which the funds in question had been held in the same depository in which they are now held. There had been no question raised as to the solvency of the bank. The funds were not likely to be wasted. No harm could possibly have resulted to any of the parties involved by the funds remaining in that bank until the question of the bankruptcy of the Tax Service Association had been determined.

As was said in *Woolf* v. *Reeves*, 65 F. (2d) 80, 82:

> "* * * It seems clear that the court should proceed no further than is necessary with the adminis-

tration of the estate in bankruptcy until the question of its jurisdiction is disposed of, * * *."

The Tax Service Association requested an immediate hearing on June 29th, but the matter was continued nearly three months, until September 21st. Petitioners cannot refrain from comparing this delay with the speed and facility with which the Sales Tax Fund litigation has been handled. The Dahl-Stedman, *et al.*, petition was also filed on June 29th, the day that the request was made for an immediate hearing on the bankruptcy matter. In connection with that petition, however, a reference was had; various motions were heard and summarily disposed of; a Referee's Report was filed; exceptions were filed and disposed of; and a final order upon these petitioners was entered on July 12th, exactly thirteen calendar days after the institution of the proceedings here appealed from.

It is earnestly submitted that the trial court erred in allowing counsel for respondents to rush this proceeding through the court, over the strenuous objections of petitioners; and that as a result of such haste the trial court allowed itself to be imposed upon and to be misled into assuming jurisdiction where it would have been apparent upon due consideration that none existed, and as a result of which haste the court was misled into denying to petitioners any opportunity to be heard upon the merits.

3.

The court disregarded Equity Rule 66 and denied petitioners sufficient time to file exceptions to the Special Master's report.

The court on July 9, 1937 (Rec. 91), ordered petitioners to file exceptions as to the referee's report within two days. The court was requested at that time to allow them ten days as provided by Rule 14 (Appendix, *infra*), of the Bankruptcy Rules of the District Court for the purpose of filing their exceptions to the referee's report. The trial court, however, took the position that the matter had been referred to the referee as a Special Master for the purpose of determining the issues in the petition. Thereupon these petitioners drew to the court's attention that (for Master's reports) under Rule 66 for Courts of Equity of the United States, petitioners should be allowed twenty days in which to file exceptions (Rec. 95). The trial court, however, insisted the matter should be summarily disposed of within three days and this, notwithstanding the fact that the hearing on the adjudication of the alleged bankrupt, over its strenuous objection, had been continued to the Fall. On the coming into court on the 12th day of July, 1937, petitioners again moved the court for a sufficient length of time in which to file their exceptions to the Special Master's report, which motion the trial court denied (Rec. 92). Thereupon they filed their exceptions to the report (Rec. 92), summarily and insufficiently prepared, in which, however, they briefly set forth the injustice done them in hurrying this matter and depriving them of a proper hearing.

RESUME AND CONCLUSION.

The present litigation constitutes a deliberate attempt to confer on a district court of the United States jurisdiction of a controversy over which it cannot have jurisdiction under the constitution, laws of the United States, and decisions of the Supreme Court. Neither of the intervening petitions stated a cause of action cognizable in any federal court, and even had your petitioners made no objection, both petitions should have been dismissed by the trial court upon its own motion, subsequently, by the Circuit Court of Appeals, and now ultimately by this court. The controversy is one between utter strangers to the bankruptcy proceeding, although respondents' attorney seeks desperately to connect your petitioners with the bankrupt by dubbing them "agents" of the bankrupt—contrary to the allegations of the intervening petitions themselves.

Jurisdiction cannot be sustained upon the theory that the bankrupt had possession of the fund, inasmuch as Craig, Harris and Odell were trustees. The funds could not be withdrawn from the bank without the order of Craig; it is nowhere even suggested that he was an agent of, under the control of, or in any way connected with the bankrupt. To the contrary, it is conceded he was not such agent. Jurisdiction cannot be sustained upon any theory of consent; there was no voluntary consent to jurisdiction in case at bar. Jurisdiction cannot be conferred upon a bankruptcy court in a non-bankruptcy matter with or without consent. Actual possession is indispensable for reclamation proceedings; in case at bar even constructive possession did not exist.

Unless this proceeding is reversed, there is no contro-

versy, jurisdiction of which cannot be conferred upon the federal courts by consent of the parties merely through the device of intervening in some pending bankruptcy proceeding.

The orders appealed from deprived your petitioners of property without any opportunity to be heard upon the merits of the issues. This right to be heard is a right of substance which cannot be "frittered" away by maneuvers of either court of counsel, and a right which a party does not forfeit, unless wilfully derelict in asserting it. At no time did petitioners waive that right. Instantly after the court had ruled adversely on the jurisdictional question, petitioners orally demanded a hearing on the merits, and within ten minutes that demand had been made a part of the record in writing.

The lower courts, in entertaining an involuntary petition against a corporation not subject to bankruptcy, committed further specific, substantial errors in law by determining prematurely an intervening controversy, and in denying proper time to file exceptions.

Ultimately, the situation is this: Your petitioners, along with one Craig, are trustees of a fund in which they have a substantial interest. Respondents herein seek to assert a claim against this fund by filing in a court, absolutely without jurisdiction, an intervening petition which containes no allegations upon which either jurisdiction or relief can be predicated. Counsel for respondents herein, through his kind of practice, not only persuades the District Court that it has jurisdiction, but prevails upon it to deny your petitioners a hearing on the merits. This unusual imposition upon the court is made possible by the fact that the trial judge allows the matter to be "jammed" through the court with such

haste as necessarily to preclude proper judicial consideration of the problems involved. Meanwhile, petitioners exercised full diligence to protect their rights, but diligence which seemingly is unavailing as related herein. Your petitioners are confident that this court will not tolerate such unwarranted assumption of jurisdiction and arbitrary denial of due process.

It is urged the orders of the lower courts appealed from be reversed.

Respectfully submitted,

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners

APPENDIX.

Example of form of employment of attorney Odell used by some of the contractors:

"On the recommendation of The Builders Association, we hereby consent to the employment of Benj. F. J. Odell as our attorney to represent us in negotiations and litigation in an effort to change the present rulings of the Retailers' Occupation Tax Act as it applies to us, the expense in no event to exceed three months' savings of such taxes, payment of our share of the expenses to be made with the approval of The Builders Association under their agreement with said Odell as to a gross maximum fee. The above is subject to Bulletins issued by Mr. Craig dated April 17th and 23rd, 1935.

DAHL-STEDMAN CO.
GEO. V. DAHL,
(Seal) *As President.*

DAHL-STEDMAN CO.
ELMORE W. STEDMAN,
April 25, 1935. *As Sec'y. & Treas.*"
(Rec. 169-170.)

RULE 14.

"PETITION FOR REVIEW OF REFEREE'S ORDERS.

"The petition for review of a Referee's order shall be filed with the Referee within ten days after the order is made, unless, before the expiration of such period, the time be extended by the Court or the Referee in charge of the case. Where the order is the result of a decision upon a contested matter, the time within which to file the petition for review shall begin to run from the date of the service of a copy of the Referee's order upon the adverse party."

Bankruptcy Rules, U. S. District Court, Northern District of Illinois.

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OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHLSTEDMAN CO., et al.,
Respondents.

PETITIONERS' ANSWER TO MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI, ETC.

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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Respondents.

PETITIONERS' ANSWER TO MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI, ETC.

After the completion of petitioners' brief recently filed in this cause comes respondents' motion to dismiss and impels petitioners to file this further brief in opposition thereto.

Respondents' reasons (their brief 16-17) for the granting of their motion, though not substantial, are fully answered in Brief for Petitioners. We submit, however:

1. Respondents are mistaken about the facts being undisputed. Respondents themselves dispute the facts. But even if the *ex parte* character of the facts as they appear in the record, and their subsequent misstatement by respondents be for this purpose disregarded, the legal questions of jurisdiction and due process are substantial and in no sense trivial.

2. A substantial question of jurisdiction exists in this cause:

(a) This controversy is between two *strangers* to the bankruptcy proceeding as discussed in Brief for Petitioners at length on pages 14 to 18.

(b) The funds in controversy in this cause were not in *custodia legis* as we have pointed out at length in Brief for Petitioners, pages 24 to 30.

Respondents' contention that jurisdiction can be sustained on a theory of reclamation is not supported by a single reclamation case. In case at bar there was no possession sufficient to support reclamation proceedings, as shown in Brief for Petitioners, pages 30 to 34.

3. Neither the appeal to the Circuit Court of Appeals nor the petition for certiorari here was filed for delay. There are involved judicial conflicts and undecided questions of law. Petitioners are not mere stake-holders but trustees having rights and liabilities as such and in addition substantial individual interests exist in the fund. The Circuit Court of Appeals denied respondents' contention that the appeal was taken for delay. (Rec. 197.) There is no motive, nor could there be, and certainly no advantage to petitioners in the prosecution of their ap-

peal merely for delay. The importance of the questions involved, to say nothing of the heavy expenses incurred by petitioners, negatives any thought of appeal for mere delay.

4. Petitioners believe the Record discloses an abuse of discretion materially affecting their substantial legal rights as pointed out in Brief for Petitioners, pages 47 to 62.

5. The decision of the Circuit Court of Appeals presents important questions of general law that are in conflict with the decisions of several other circuits and of this court, as pointed out in our petition for certiorari, pages 8 to 12 and cases cited. There are in addition, questions of federal and bankruptcy law which this court has not as yet decided.

RE RESPONDENTS' MOTION TO AFFIRM.

Respondents have presented alternative motions: First, to dismiss the Writ of Certiorari already granted; second, to affirm the decision below. Inasmuch as the second can be disposed of rather summarily, brief attention is directed to it. Rule 7, subsection 4 of this court provides for a motion to affirm on two grounds only: First, "that it is manifest that the appeal is taken for delay only, * * *", second, "* * * or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. * * *"

It is apparent that respondents do not seriously seek to sustain either of the grounds they allege to exist. They direct no argument to the point dealing with delay. Moreover they specifically urged this argument of delay upon the Circuit Court of Appeals, and that court flatly held against them. (Rec. 167, 197.) There is nothing any-

where in the record, in respondents' statement of facts, or respondents' argument which indicates any motive for delay, any possible advantage in delay, or any conduct on the part of petitioners which would indicate any attempt to produce delay. Respondents merely shout, "delay", and pass on.

The alleged ground that no substantial questions requiring further argument are presented is untenable upon its face. A cursory inspection of petition for certiorari, particularly pages 7 to 12, as well as Brief for Petitioners, clearly refutes such argument.

Now, for the first time, respondents state the theory upon which they predicated jurisdiction; now they have decided that this controversy is a reclamation suit. (Their brief, page 22.) The necessity for, and relevancy of "further argument" with respect to this new contention is apparent, especially so by reference to Brief for Petitioners, pages 30-34. Necessity for "further argument" is obvious now in view of the fact that none of the cases cited by respondents, to sustain jurisdiction on the reclamation theory, are reclamation cases.

It is, therefore, clear that respondents' faint-hearted suggestion that the certiorari was sought for the purposes of delay, and that no substantial questions requiring further argument are involved, cannot be accepted; and this court should deny that alternative of the motion which seeks affirmation of the decision below.

RE RESPONDENTS' MOTION TO DISMISS.

The principal alternative of respondents' motion seeking dismissal of the Writ of Certiorari, is by their own statement based solely upon the proposition that your petitioners have misled this court by misstating the facts

of the present controversy. (Respondents' brief, page 3.) It therefore follows that if respondents' contentions of misstatement cannot be sustained, their entire motion falls. Let us consider these alleged instances:

Respondents object (page 13) to petitioners' reference to (Rec. 169) a form of separate written contract used for the employment of Odell as attorney for the contractors. (Appendix to Petition and to Brief for Petitioners.) This comment comes from respondents with decidedly poor grace in the light of the fact that George V. Dahl who signed the Appendix contract was the same George V. Dahl who swore under oath, that the contract signed by numerous contractors engaging Odell separately was a radically different form of contract. (Rec. 25.)

Respondents state (pages 13 and 14) that petitioners' statements of the *Blome* and *Herlihy* cases are untrue. We respectfully point out to the court the following significant language in the *Blome* case:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> *Reversed and remanded.*"

Blome Co. et al. v. *Ames,* 365 Ill. 456, 459-460.

The receiver in bankruptcy filed his answer in which he stated "that said opinion insofar as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners [respondents here] * * * and effected substantial tax savings."

Irrespective of later developments, it cannot be d puted that the $72,000 in question here was money sa to the contractors as a result of the decision procu by Odell in the *Blome* case.

In addition, the Supreme Court of the State of Illin later voluntarily made a further decision for the contr tors who were in the *Blome* case as follows:

> "* * * The *Blome* case involved 'contractors w agreed to furnish and install building materials a fixtures, to do excavating, make foundations, er buildings, and make various kinds of repairs to buil ings already built.' It is directly in point here. W have reconsidered in this opinion the reasoning up which part of that decision rests and no longer fe iimpelled to follow it. So far as that case appli to construction contractors who furnish labor a materials in excavating for basements, sewers, wat mains or other purposes, or in the erection of found tions or buildings, or in the making of various kin of structural repairs to buildings, the *Blome* case expressly overruled."
>
> *Herlihy* v. *Nudelman*, 367 Ill. 600, 605.

As a result of this second decision concerning the co tractors in the *Blome* case, they are now entitled to saving, not only of the 25% aforesaid, but to an add tional saving of 75% or total of 100% of the amount money deposited by them in escrow as sales taxes claim by the State. This total saving is made possible by special provision in the Retailers' Occupation Tax Act Illinois as follows:

> "CREDITS OR REFUNDS.
>
> "Section 6. If it shall appear that an amount tax, penalty or interest has been paid which w not due under the provisions of this Act, whethe as the result of a mistake of fact or an error law, then such amount shall be credited against a

tax due, or to become due, under this Act from the person who made the erroneous payment, of such amount shall be refunded to such person by the Department."

Smith-Hurd Illinois Statutes, Chap. 120, Sec. 445.

Further details of said litigation appear in the Record at pages 163 to 164.

Respondents have further objected (page 14) to petitioners drawing the Court's attention to the unusual manner in which the order of June 29, 1937, was obtained by counsel for respondents. Nowhere is this charge denied, nor can it be denied, and nowhere is it explained why this extraordinary method was resorted to.

Respondents assert (page 15) that there is no foundation in the Record for petitioners' statement that there was an agreement in open court that the question of the jurisdiction of the trial court over the 25% balance was expressly reserved. We refer the court to pages 93-94 of the Record which is a part of the pleadings of this case and also to the referee's finding concerning opposing counsel's own statement on this matter. (Rec. 62.) This question is treated at length on pages 34 to 40 in Brief for Petitioners.

Respondents object to petitioners' use of the word "abandoned" when applied to the Avery Brundage petition, and say that their second petition was supplementary to their first petition. An examination of the second petition, however, reveals that it does not incorporate by reference, any of the allegations of the first petition. (Rec. 69.)

Respondents object (page 15) to petitioners' contention that the Tax Service Association was a not for profit corporation. There is nothing in the record to indicate the District Court found the Tax Service Association

bankrupt. The alleged adjudication occurred *after* this controversy had been fully disposed of by the Circuit Court of Appeals. The record shows undisputably that the Tax Service Association was organized as a not for profit corporation under the Illinois Statute. (Rec. 6, 9.) The mere fact that the court transcended its jurisdiction and erroneously adjudicated the association does not, of course, preclude these petitioners from raising such jurisdictional question collaterally, inasmuch as it concerns jurisdiction of the subject matter. In any event, such adjudication by the District Court, right or wrong, is immaterial here because it occurred nine months after the entry of the erroneous order appealed from. It is the status at the time of the appeal July 12th and 13th, 1937, that is important and not what may or may not have happened later.

Thus, from the above enumerations, it appears that the so-called "misrepresentations" referred to by respondents do not exist. On the contrary petitioners' statements in their petition are fully borne out by the Record and fairly and accurately made.

RE RESPONDENTS' STATEMENT OF THE CASE.

Perhaps for the record some corrections should be made of inaccuracies that seem to have crept into respondents' brief. On page 6 respondents state:

> "On May 3rd an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a receiver."

In the first sentence of the next paragraph we find the following language:

> "Respondents' petition filed May 24, 1937, averred all of the foregoing facts * * *."

Nowhere in the entire petition is there any reference directly or indirectly to the filing of the involuntary petition. This device should not be permitted in a desperate attempt to remedy defects in respondents' petition. Such an allegation was indispensable and its omission fatal. (See petitioners' brief, 40-47.)

Respondents (pages 6 and 7) have added the words "agents of the alleged bankrupt" whenever they refer to Harris and Odell, petitioners herein, as though the continuous assertion would create such relation. The term "agents" is used by them not less than six times on pages 6 and 7 alone. Conspicuous by its omission is the name of the other escrowee, Craig. Respondents have remained discreetly silent concerning him and his position throughout their entire brief,—and small wonder. It is clear that Craig had as much control over the fund as Harris and Odell and not one cent of the funds could be released without his approval and signature. Craig never had any connection with the alleged bankrupt. Respondents say (page 5):

> "In acting as custodian of the funds, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt."

They very conveniently omit part of their own allegations previously made in the Avery Brundage petition (Rec. 28) as follows:

> "In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners [respondents here] * * * "

Respondents say (page 5) that Odell was not to get any money even if the litigation was successful. This

assertion ignores not only the separate contracts of the individual contractors with Odell (Rec. 25 and petitioners' brief Appendix); but the common sense inference arising from the fact that attorneys do not often engage in prolonged, arduous litigation gratuitously.

Respondents say (page 11) that on June 29th there was no question of bankruptcy jurisdiction before the court and hence no question was presented by Harris' and Odell's motion to strike respondents' petition of June 29th. They conveniently ignore the fact that the bankrupt had raised the question of the jurisdiction of the subject matter of the bankruptcy court over a "not for profit" corporation, and that by the referee's report, the bankrupt's motion to quash, raising that question, was ordered to stand as an answer to the involuntary petition. (Rec. 68.) Thus, the question of the jurisdiction of the bankruptcy court was pending undetermined at the time of the filing of the Dahl-Stedman petition, and respondents are mistaken.

Respondents (page 5) say "the bankrupt and Odell" instituted a suit for the contractors. The bankrupt was not, nor could it be, a party to the Sales Tax litigation nor was it Odell's client at any time.

Respondents say (page 3) there are no "disputed facts". Such an assertion is unwarranted. Petitioners were precluded from filing any answer to the merits and, hence, were unable to file any pleadings contradicting "facts" alleged by the respondents' pleadings.

Respondents say (page 5) "at the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Funds, although none of them were then acting for these respondents in any capacity." This assertion is utterly unsupported and is disputed.

If affirmatively appears from the respondents' own petition that the funds were in the custody and control of Craig, Harris and Odell. (Rec. 28.) No demand was ever made upon the bankrupt, but it is alleged demands were made on Harris and Odell, individually, and that they were requested to cease from acting as the agents of respondents.

RE RESPONDENTS' ARGUMENT ON THE LAW.

Although respondents' motion to dismiss the certiorari is, by their own statement, based solely on their contention that petitioners misrepresented the facts, and although such contention has been shown to be without merit, petitioners direct brief attention to some points of law involved in respondents' brief.

Petitioners' brief (pages 12-24) shows conclusively that the court did not have jurisdiction of the subject matter in case at bar; and (pages 27-34) that the court did not have possession, control or custody in any way of the funds in question; and (pages 24-27) that none of the escrowees was an agent of the bankrupt in case at bar.

The authorities cited by respondents (page 18 of their brief) from *Page* v. *Arkansas* to *Remington on Bankruptcy* are all based on the theory that the court had undisputed jurisdiction and also had possession, control or custody and were not cases where there were disputes with respect to either possession or agency.

Respondents have argued (page 22) that their action in essence is "a simple reclamation suit". Yet not one of the cases cited in support of jurisdiction is a reclamation suit. All the cases cited on page 18 of their brief are cases in which a trustee is seeking to have a third party turn over property to the bankruptcy estate—all

"turnover" proceedings. Even in a "turnover" proceeding where property is sought to be recovered from a mere agent of the bankrupt, it is absolutely essential that such agent hold the property exclusively and unconditionally subject to the bankrupt's orders. The property was not so held here. Moreover, "such property" must be other than a chose in action. The property here in litigation was a mere chose in action. (See petitioners' brief, pages 27-30.)

In case at bar, property was not in the actual or even constructive control of the bankrupt nor of any agent but in the actual exclusive, undivided possession of three independent trustees, utter strangers to the bankruptcy proceeding, and not any one of which trustees had individual or absolute control.

The cases cited by respondents on page 19 of their brief are not in point because they do not involve the issues of the case at bar, that is lack of jurisdiction over the subject matter. Respondents have quoted on page 29 a decision citing Freeman on Judgments to support their contention on the matter of judgment by consent. Had they turned to Volume One of the same text (Freeman on Judgments, Vol. 1, Sec. 337) they would have found:

> "Jurisdiction of the subject matter is essential in every case; a condition precedent, in a way, to the acquisition of authority over the parties. * * *
>
> Jurisdiction of the subject matter has reference to the nature of the cause of action or the relief sought. * * * As power over the subject matter is given by law, nothing but an additional grant from legislative authority can extend that power over a class of cases formerly excepted; and neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act."

It being impossible, therefore, to confer jurisdiction as to the subject matter on the trial court by consent, the so-called consent by respondents becomes immaterial. Petitioners were not the ones who invoked the jurisdiction of the court and, consequently, estoppel cannot apply. Furthermore, in the interim, there had been no reliance upon any act of petitioners and no damage had resulted to respondents, both of which are essential elements of estoppel.

Respondents question petitioners' "appealable interest." Petitioners are not mere stakeholders. They have substantial duties to perform and one of the petitioners has an individual interest and claim as well as a trustee's interest. In addition, all of the escrowees are trustees for many contractors other than those involved in this proceeding, who have deposited in said fund and have interests therein that may conflict with the interests of respondents. Such contractors, not being made parties to this proceeding, will likewise be deprived of property without due process of law.

Even if petitioners were mere stakeholders and had no interest, respondents are estopped from asserting that there is no appealable interest. As was said in *State* v. *Cranney*, 30 Wash. 594, 71 Pac. 50:

> "The respondents move to dismiss the appeal herein for the reason that the appellant has no appealable interest in said cause. There seems to be nothing in this motion. If a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal should the judgment be against him."

See also:

Carroll v. *Fowler*, 33 S. D. 303, 145 N. W. 545.

Marion County v. *Wilson*, 105 Ky. 302, 49 S. W. 8.

State v. *Rombotis*, 120 La. 150.

Respondents, having made your petitioners parties to this proceeding, cannot now contend that there is no appealable interest. Petitioners were indispensable parties had jurisdiction existed.

All of the cases cited by respondents, are cases in which the parties did not have or claim an interest, and they could not be affected one way or another by the decision of the court. Respondents have said nothing to this court about the expenses to which the petitioners have been subjected in having been made defendants in this suit, nor have they mentioned the assessment of interest against them by the Circuit Court of Appeals. Certainly these alone would create an appealable interest.

Respondents' argument that petitioners have no appealable interest operates rather curiously with respect to that portion of the appeal based upon denial of a hearing on the merits. Respondents contest the right to appeal on the theory that the record shows no appealable interest, whereas the very thing being appealed from is the denial to petitioners of an opportunity to introduce into that record evidence showing *inter alia* such an appealable interest.

Respondents have contended (page 35 of their brief) that a trustee, even though an attorney in litigation as well, has no lien for his attorney's fees out of retained funds and they quote in support *Story* v. *Hull* (143 Ill. 506), an Illinois case which was decided in 1892 before the attorneys' lien law in Illinois went into effect in 1909, and the case, in any event, is not applicable here as the facts are different. In their argument and citations on the matter of Odell's lien for fees, they have ignored the separate contracts of engagement between the contractors and Odell which they well know exist. (Petitioners' brief, page 64.) In this connection we should bear in mind

that petitioners have not been given an opportunity to be heard on the merits and to present their rights and facts, and the circumstances concerning the creation and distribution of the escrow fund.

Respondents (on page 35 of their brief) have asked why petitioners consented to the payment of moneys to the State out of the Escrow Fund when there were injunctions in force and effect against petitioners. The answer is that the State was not a party to that injunction and part of the funds were held for it and there was an order in the Circuit Court of Cook County directing the payment of said funds to the State of Illinois (the principal beneficiary of the fund) in order to avoid the $100,000 penalty. Also all parties in interest in the injunction matters expressly consented to the payment of the funds to the State of Illinois, as provided by the District Court's order.

CONCLUSION.

It being apparent that this appeal was not taken for delay and substantial questions of law, involving conflicts between circuits and with this court, and several important undecided questions of bankruptcy and federal law being present, the motion of respondents to affirm should be denied. Since it appears that the facts were properly stated to the Court in petitioners' original petition for certiorari, and inasmuch as no substantial ground, in fact or law, is advanced by respondents for altering the Writ of Certiorari, respondents' motion to dismiss should likewise be denied.

Respectfully submitted,

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

These petitioners would have appreciated respondents following the order of petitioners' brief. Undoubtedly, it would have assisted both the Court and counsel. Petitioners' brief listed seven erroneous assumptions of the

District Court, any one of which is fatal to the decision there rendered. It is to be observed that respondents have failed utterly to justify any of these erroneous assumptions.

Respondents' brief is replete with suggestions ranging all the way from mere insinuation to sweeping charges that petitioners have misstated the facts. These are the same suggestions in substance which were made to this Court in the brief supporting respondents' recent unsuccessful motion to dismiss the certiorari. Petitioners discussed such charges in their brief filed in opposition thereto and shall not make the brief unnecessarily lengthy by repetition here. It is believed that mere reference to the record is sufficient to demonstrate the falsity of these charges.

Respondents make use of one device in argument which it may be well to note. They call attention (their brief 13-18) to various statements made in petitioners' brief which are fair inferences from the record, and then, although they do not deny the statements, or point out any reason why they do not constitute fair inferences, they state that we are not justified in making such inferences simply because the matter so inferred does not appear in the record in the exact language which the petitioners employ. In view of the *ex parte* condition of the record, it certainly seems that petitioners should not be denied the benefit of those inferences which naturally and inescapably arise from the literal language of such record.

It is unfortunate enough for petitioners to be denied the opportunity to present their facts in the case. It seems wholly inexcusable for respondents not only to strain and distort the construction of their petitions and of the orders they drafted, but to deliberately misstate those facts, and to allege in argument that facts are in the record when they are not.

Throughout their brief respondents have reiterated the assertion that their petition contained an allegation of the fact that Harris and Odell were agents of the bankrupt. The only allegation in the petition in this respect is as follows:

> "In signing said letter to the National Builders Bank of Chicago aforesaid, dated May 2, 1935, *said Craig, Harris and Odell were acting as the agents and representatives of the petitioners,* and said Craig was also acting as the representative of the Building Construction Employers' Association and the other associations who were 'subscribers' to said agreement of April 9, 1935, and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, the other party to said agreement of April 9, 1935. * * *" (Italics ours.) (Rec. 28.)

This language discloses a relationship of trustee and beneficiary, and not that of principal and agent.

Respondents, in their brief, have again asserted that:

> "On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a receiver. * * * Respondents' petition, filed May 24, 1937, averred all of the foregoing facts. * * *" (Brief for Respondents, pages 5-6.)

There is no such allegation. We previously pointed out to respondents this misconception by them although without avail.

Respondents relate that the bankrupt and Odell instituted a suit for the respondents. The bankrupt was not a party to the tax suit as the *Blome* case in 365 Ill. 456 discloses. This error also has been previously drawn to their attention without avail.

Respondents constantly labor under the impression that petitioners here were agents of the bankrupt. This is

erroneous and quite confusing. The fact remains that Craig, Harris and Odell, as disclosed by the letter to the bank, signed as individuals, not as agents, and the name of the bankrupt does not appear in the letter directly or indirectly and nowhere in the record is there any intimation of the bankrupt's control in any way over the funds in escrow.

Respondents state (pages 14 and 62) that petitioners' statements of the *Blome* and *Herlihy* cases are untrue. We respectfully again point out to the Court the following significant language in the *Blome* case:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> *Reversed and remanded.*"

Blome Co. et al. v. Ames, 365 Ill. 456, 459-460.

The receiver in bankruptcy filed his answer in which he stated "that said opinion insofar as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners [respondents here] * * * and effected substantial tax savings."

Irrespective of later developments, it cannot be disputed that the $72,000 in question here was money saved to the contractors as a result of the decision procured by Odell in the *Blome* case.

In addition, the Supreme Court of the State of Illinois later voluntarily made a further decision for the contractors who were in the *Blome* case as follows:

"* * * The *Blome* case involved 'contractors who agreed to furnish and install building materials and fixtures, to do excavating, make foundations, erect buildings, and make various kinds of repairs to buildings already built.' It is directly in point here. We have reconsidered in this opinion the reasoning upon which part of that decision rests and no longer feel impelled to follow it. So far as that case applies to construction contractors who furnish labor and materials in excavating for basements, sewers, water mains or other purposes, or in the erection of foundations or buildings, or in the making of various kinds of structural repairs to buildings, the *Blome* case is expressly overruled."

Herlihy v. *Nudelman*, 367 Ill. 600, 605.

As a result of this second decision concerning the contractors in the *Blome* case, they are now entitled to a saving not only of the 25% aforesaid, but to an additional saving of 75% or total of 100% of the amount of money deposited by them in escrow as sales taxes claimed by the State. This total saving is made possible by a special provision in the Retailers' Occupation Tax Act of Illinois as follows:

"Credits or Refunds.

"Section 6. If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the person who made the erroneous payment, or such amount shall be refunded to such person by the Department."

Smith-Hurd Illinois Statutes, Chap. 120, Sec. 445.

Throughout the brief respondents stress the fact that their petition contains some allegations with respect to certain books and tax returns. It need only be pointed out that the subject matter of this appeal at all times

has been the funds. There was no ruling by the Court on any alleged books or records. Respondents themselves abandon their claim to the books and records in their so-called "agreed" order. This demonstrates the fact that the allegations were clearly not interposed in good faith but merely for the purpose of creating the appearance of jurisdiction where none in fact existed. (As a matter of fact, the "books" spoken of is a mere "book" and was kept for the convenience of the trustees and as their sole property just as were the copies of tax returns, many of which were made up by and for the trustees. Neither the book, the entries in it nor the copies of the tax returns have value to any one but the trustees. The entries were made on a few pages by and for the trustees and not for anyone else. The book and copies of the returns were not in the possession of the bankrupt but were in the possession of the trustees. (Rec. 26, 31, 32, 33, 35.) Respondents' petition prays that the said book and records be turned over to the respondents. However, the so-called "agreed" order (Rec. 40-1) required respondents to present a list to one of the petitioners—directly contrary to the prayers of their petition.

Respondents state on page 38 of their brief:

> "• • • (1) respondents' petition alleged that the Escrow Fund was held by the bankrupt and that petitioners in their relations to the Fund were the agents of the bankrupt; • • •"

Respondents are again mistaken for there are no such allegations in their petition. On the contrary, it affirmatively appears from their petition that the funds were not under the custody and control of the bankrupt but were under the custody and control of the trustees. In this connection, it is to be noted on page 44 of our main brief we challenged respondents to point out to the court

a single allegation in their Dahl-Stedman petition which states either directly or indirectly that the funds were subject to the control of the alleged bankrupt. Not only do respondents fail to meet this challenge, but they continue to indulge in this misrepresentation.

Respondents dissent (page 13 their brief) from petitioners' construction of the contract between the alleged bankrupt and the various contractors. They still contend for a construction under which Odell is to work gratuitously even if successful. This position ignores not only the general relationship of the parties and the separate contracts of the individual contractors with Odell (Rec. 169-70, 25 and Petitioners' Brief Appendix) but the common sense inference arising from the fact that attorneys do not often engage in prolonged, arduous litigation gratuitously.

ARGUMENT

For the convenience of the court, from here on we shall discuss the points involved in respondents' brief in the order pursued in our main brief and therein answer the miscellaneous argument of respondents to our points.

Point I.

The court of bankruptcy did not have jurisdiction to enter the orders appealed from.

The controversy was not a bankruptcy controversy but one between strangers to the bankruptcy proceeding.

Seemingly the only basis on which respondents seek to establish a connection between this proceeding and the bankruptcy proceeding is that petitioners were agents for the alleged bankrupt, and that such relationship would confer jurisdiction upon the court on some theory of constructive possession. Inasmuch as the agency controversy and the constructive possession theory are treated specifically in Sub-sections 3 and 4 hereof, discussion of those points is relegated to those appropriate sections.

Although respondents notice *Nixon* v. *Michaels*, 38 Fed. (2d) 420, relied upon in petitioners' brief, they do not seek to impeach its authority, but seek to distinguish it upon two grounds: (1) That the controversy there was between strangers, and (2) that neither the bankrupt nor trustee claimed any of the property. It is submitted that those elements do not distinguish the case. Here too,

the controversy is between strangers; here too, neither bankrupt nor trustee has made any claim to the fund in question. It is true that respondents eventually maneuvered the bankruptcy receiver into a position where he was compelled to make a tentative claim to some of the property and to ask that a portion of the funds be held pending adjudication. However, the first intervening petition specifically alleged that neither the bankrupt nor the receiver had any interest therein. (Rec. 28.) It was not only after the filing of this petition, but a full week after the entry of the so-called "agreed" order that the receiver even suggested any claim. Hence, assuming that this distinction of the *Nixon* case be a substantial one, nevertheless, between the date of filing of the petition and that of the receiver's answer, the situation would be identical with that of the *Nixon* case, the court would be utterly without jurisdiction, and your petitioners are at a loss to understand how the filing of an answer in a proceeding in a court which has no jurisdiction can confer upon that court jurisdiction of that cause—especially in view of the duty of a federal court to dismiss upon its own motion a proceeding over which it has no jurisdiction. (See pages 42 to 47 of Brief for Petitioners.) Of course, it is understood that the alleged claim of the receiver in case at bar is not made to the $48,580 here in litigation.

2.

This litigation constitutes neither a proceeding in bankruptcy nor a controversy arising out of bankruptcy and hence cannot be cognizable by a court of bankruptcy.

Respondents demur to answering what they characterize as "Petitioners' involved argument" (pages 18 to 24 Brief for Petitioners) about Section 23 of the Bankruptcy Act. They say that it is irrelevant, (page 40

their brief) because respondents predicate jurisdiction upon Sub-sections (6) and (7) of Section 2 of the Act. Petitioners concede that it is irrelevant so long as respondents do not seek to predicate jurisdiction upon it. Petitioners sought to rebut every possibility of jurisdiction, including Section 23, because at the time petitioners' brief was written they were not clear as to just what respondents theory of jurisdiction was. They still are not entirely sure. Respondents' disclaimer of any reliance upon Section 23 greatly simplifies the question of jurisdiction inasmuch as *Page* v. *Arkansas Natural Gas Co.*, 53 Fed. (2d) 27; 286 U. S. 269, so confidently relied upon by respondents, was sustained by this court solely upon the basis of Section 23 (b) of the Act. Likewise, the host of other cases cited by respondents to support their inapplicable constructive possession and consent theories were cases decided solely or principally upon the basis of Section 23 (b) of the Act.

Respondents state that they predicate jurisdiction upon Sub-sections (6) and (7) of section 2 of the Act. (Pages 23-24, their brief.) That the present controversy does not involve a "proceeding in bankruptcy" within the purview of Sub-section (6) of Section 2 of the Act is demonstrated by reference to *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and to innumerable other cases of this court, some of which are cited on pages 18 and 19 of Brief for Petitioners. Respondents do not state whether they predicate jurisdiction on Sub-section (6) or Sub-section (7) of Section 2. Petitioners respectfully submit that it is high time that respondents decided.

Respondents, without stating whether they do or whether they do not rely upon Sub-section (7) of Section 2, seek to meet our argument contained on page 19 of our main brief, showing the inapplicability of that sub-section,

by misstating our position, and in typical fashion erecting a man of straw which they proceed to tear down. (Page 40 of their brief.) Petitioners pointed out that the words used in Sub-section (7) obviously refer to "estates of bankrupts". Respondents thereupon state that "petitioners claim that the court has jurisdiction under Sub-section (7) of Section 2 only of property *owned* by the bankrupt * * *". Respondents then conclude "there is no basis for petitioners' contention". Mere reference to Sub-section (7) of Section 2 demonstrates the absurdity of their argument. Petitioners' argument with respect to the inapplicability of either Sub-section (6) or Sub-section (7) of Section 2, or of Section 23, thus stands wholly unimpaired by respondents' answer thereto.

Although, as indicated, respondents predicate jurisdiction either upon Sub-section (6) or (7) of Section 2 as stated in their brief on page 40, they nevertheless state on page 23: "In essence, this is a simple reclamation suit." Either respondents are seeking deliberately to befuddle the issues, or they are laboring under a misapprehension with respect to the nature of reclamation suits, i. e., that jurisdiction of reclamation suits is predicated upon Sub-section (6) or Sub-section (7) of Section 2 of the Act. The fact that reclamation suits are based upon no provision of the statute, but upon the inherent jurisdiction of a court to deal with property within its actual possession, has been settled by this court in *Murphy* v. *Hofman*, 211 U. S. 562, 568-9. Jurisdiction upon the theory of reclamation is dealt with at length on pages 30 to 34 of petitioners' main brief, and will be referred to again in this reply.

3.

The escrowees were not agents for the alleged bankrupt nor were they subject to its control.

It seems strange that although respondents find occasion to refer to Harris and Odell as "agents" of the Tax Service Association thirty miscellaneous times in their brief, they do not once point out any facts on which their assumption is based. They do not point out to the court any allegation in their petition to support such contentions. Of course, there is none, and repetition is a poor substitute for allegations or facts.

The petition does disclose in this particular, as above, that Craig, Harris and Odell were trustees.

Respondents ignore the legal distinction between agents and trustees.

> "* * * In the ordinary agency, the title to any property involved, and usually to all the proceeds of the agency, remains in the principal, and the agent acts in the name of the principal; in a trust the legal title is in the trustee, and he acts in his own name. Agency may in general be revoked at any time; a trust can ordinarily be terminated only by the fulfillment of the purposes of the trust. It is the business of the agent to make contracts binding his principal to third persons; a mere trustee cannot render either the creator of the trust or the beneficiary liable to third persons. * * *"
>
> Corpus Juris, Vol. 2, 425.

> "A trustee is not an agent. * * *"
>
> *Taylor* v. *Davis*, 110 U. S. 330, 334.

The funds were subject to the control only of the three trustees, Craig, Harris and Odell. The alleged bankrupt's name in no way appears in the account or in the letter of authority to the bank. Title to the funds was in the three escrowees and not in the alleged bankrupt.

There was neither actual nor constructive possession within the meaning of such terms as used by the authorities.

Respondents have taken the position that all property in the hands of an agent of the bankrupt is in *custodia legis* even though the property does not belong to the bankrupt. (Their brief, 19, 24, 27.)

Although the dictum of some cases that respondents cite might at first glance suggest such a rule, it is apparent from further observation that those cases are not in point because all of them are "turn-over" and not "reclamation" cases.

Respondents' contention should not be stretched to be applied generally to property which does not belong to the bankrupt but which happens to be in the hands of an agent of the bankrupt. Respondents' contention would give the bankruptcy court jurisdiction over any and all property without limitation upon the mere ground that the property happened to be in the custody of one who acted as an agent for the bankrupt. Surely respondents' contention is neither logic nor law.

Respondents have said (their brief, page 46) that the court had actual custody and control of the escrow fund. If this were the case, why did not the court distribute the funds itself without ordering others to do it?

The answer is clear. Respondents have finally been compelled to admit (page 43, respondents' brief) that because Craig was not an agent of the bankrupt, the bankrupt did not have control of and the power to distribute the fund; that the most that could possibly be ascribed to the bankrupt was power to prevent disbursement. (Even this means of negative control is based upon the false as-

sumption that one or both of the petitioners were agents of the bankrupt.) Certainly this negative control thus assumed to be vicariously conferred on the court, would amount to no more than the restraining power which the court had anyway, and could not possibly constitute any basis for jurisdiction.

These petitioners pointed out in their main brief that the law is well settled that even for the purpose of jurisdiction in "turn-over" proceedings the agent must hold the property unconditionally subject to the sole order of the bankrupt.

Buss v. *Long Island Storage Warehouse*, 64 Fed. (2d), 338, 340.

Sproul v. *Levin*, 88 Fed. (2d), 866.

To this legal principle, respondents are silent.

In answer to petitioners' contention that the funds here in litigation were merely a chose in action, and hence not property susceptible to being in possession, respondents cite a list of cases, and Remington on Bankruptcy on page 44 of their brief, all of which are either not in point, or do not support their position, *e. g.*, several of the cases specifically hold that the property sought to be reached was not a chose in action; in other cases respondents have overlooked the distinction between jurisdiction to determine the relative rights of the bankrupt and some other person to enforce a chose in action, and the actual jurisdiction to enforce the chose in action itself against the third party debtor.

5.

Mere constructive possession is not sufficient to confer upon the bankruptcy court jurisdiction over a reclamation suit.

Respondents do not answer but seek to evade this portion of petitioners' argument. They attempt to weaken the effect of *Murphy* v. *Hofman*, 211 U. S. 562, 568-9, by pointing out that there was actual possession in that case, and suggest that the court "was not attempting to emphasize *actual* possession or distinguish between actual and constructive possession". From the passage quoted from that case on page 33 of our main brief there can be no doubt that it is actual possession, that it is the taking of property "into its possession, through its officers" which brings "into play" the principle of reclamation.

Even assuming *arguendo* that one or both of the petitioners was an agent for the bankrupt, it is clear that there can be no actual possession nor possession at all other than in a constructive, purely fictitious sense—certainly not in the sense that the term "possession" is used in *Murphy* v. *Hofman*. Particularly is this true in view of respondents' admission that the bankrupt had no control over Craig and was powerless to disburse or control the funds other than in a purely negative sense, i. e., it might prevent their disbursement.

It will be recalled, as indicated in Sub-section 2 *supra* that respondents still are not certain whether they seek to sustain jurisdiction upon the basis of Sub-sections (6) or (7) of Section 2 of the Act, or upon the theory of a reclamation suit. Although respondents state (page 23) that this is a "simple reclamation" suit, on page 45 they use the following language:

> "If a reclamation suit means reclaiming tangible property in the manual possession of the Receiver

> or trustee, the instant case was *not a reclamation suit*. Respondents were asking that a bank deposit in the custody and control of the bankrupt be turned over to them. Fundamentally, therefore, this was a reclamation suit just as were *numerous other cases* where manual possession of tangible property was not in the Receiver or the trustee, but where it was held that the bankruptcy court had jurisdiction of the bank deposit or Escrow Fund or chose in action for the purpose of determining to whom it belonged and of returning it to its rightful owner. * * *" (Italics ours.)

Respondents do not cite any of the "numerous other cases", and your petitioners are convinced that there are none; at least after exhaustive search, they have been unable to find any. Aside from *Murphy* v. *Hofman*, just discussed, respondents cite only one reclamation suit in their entire brief. This is the case of *Denton* v. *Gurnett*, (C. C. A. 8th Circuit) 69 Fed. (2) 750. This case is perfectly in accord with our argument and is misstated by respondents on page 29 of their brief. Respondents state with respect to that case that "at the time the petition was filed, the stock was not in the possession of the bankrupt but was pledged by it." In fact, the reclamation suit there was brought to recover 270 shares of utility stock. At the time of the filing of the *petition in bankruptcy*, 100 shares were in the bankrupt's "strong-box" and were never out of the possession of the bankrupt or receiver. The other 170 shares were at the time of the filing of the petition in bankruptcy in the hands of a pledgee along with other collateral to secure a debt of the bankrupt. Before the filing of the *reclamation petition*, the pledgee had sold some of the other collateral, had satisfied the debt, and had returned the 170 shares of utility stock to the receiver. Thus, all of the stock reclaimed in that suit was in the actual physical possession of the receiver at the time the reclamation

proceedings were commenced. The Circuit Court of Appeals in that case says on page 751:

> "These proceedings were instituted while the Utilities stock was in the possession of the receiver in bankruptcy."

6.

The petitioners did not in fact consent to the jurisdiction of the bankruptcy court.

Respondents have not met petitioners' argument upon this point except to characterize it as "frivolous", and except by restating and misstating it in facetious form, e. g., the first paragraph of their Point "C". (Page 53-6, respondents' brief.) Petitioners certainly did not intend that argument as frivolous, nor do they think it is. Petitioners, trustees, found themselves in a position where their beneficiaries were likely to lose a large sum of money, and where they themselves might be liable for such loss. A court wholly without jurisdiction was nevertheless entertaining a proceeding which threatened to prevent your petitioners from averting this loss. The pressure of such a situation does not appeal to your petitioners as being frivolous. We call attention to the language used by respondents themselves in their conclusion on page 69 of their brief:

> "* * *. When petitioners were confronted by the possibility that their refusal to turn over respondents' money to respondents might subject them to a personal liability of $100,000, they consented to the District Court's taking jurisdiction of the Escrow Fund and distributing it. * * *."

7.

Consent cannot confer jurisdiction of the subject matter, i. e., jurisdiction on the bankruptcy court of a controversy between strangers to the bankruptcy proceeding.

Respondents in their brief (page 56) seem to make light of the fact that jurisdiction in all federal courts must appear from the allegations of the party invoking that jurisdiction and that no substitute or later developments will answer in its stead, and seem to feel that at all events the bankruptcy courts are not subject to such limitations.

Both of respondents' intervening petitions are fatally defective in that they failed not only to state a cause of action cognizable in any court, but also in that they failed to allege any grounds whatsoever of federal jurisdiction.

Respondents have asserted that necessary jurisdictional allegations were present in their intervening petitions. A reading of these petitions conclusively shows an absence of any allegations of jurisdiction. Respondents resort to "judicial notice" as a substitute for jurisdictional requirements but they quote no authority. As heretofore pointed out it was the duty of the court to dismiss summarily the intervening petition even though the defect had not been called specially to its attention.

Respondents contend (page 48-53, their brief) that parties cannot appeal from an order to which they have consented. The petitioners here have not and are not appealing from the so-called consent order of May 27th. Petitioners did not consent to the orders from which they are appealing but objected to the jurisdiction immediately upon the filing of the intervening petition on which those orders were entered.

The *Swift* and other cases respondents have cited in this regard are cases in which the very orders cons' ted to were appealed from. Not so in case at bar.

In all respondents' cases the court had jurisdiction of the subject matter. In the *McGowan* case (237 U. S. 285) the only dispute was with respect to whether or not equity jurisdiction could be waived when there was an adequate remedy at law. That issue is not involved in the case at bar. If respondents' contention is correct, i. e., that jurisdiction can be conferred by consent on courts of bankruptcy, then we nullify all of the limitations upon the jurisdiction of the federal courts, because parties could bring any litigation whatever into the federal courts by merely intervening in a bankruptcy proceeding.

Point II.

The orders appealed from deprived petitioners of property without any opportunity whatever to be heard on the merits of the issues.

It has not been denied that petitioners were required to sign summarily a check for $48,580 without protection, indemnification or hearing on the merits of the issue despite the fact that promptly upon the overruling of petitioners' motion to strike, an immediate request was made for hearing on the merits and that opportunity summarily denied them. (Rec. 96.)

There is a fundamental fallacy by both the respondents and the Circuit Court of Appeals in the treatment of denial of the right to be heard on the merits. The refusal to permit petitioners here to be heard on the merits is sought to be justified, if not solely, principally, upon the ground that if such right had been accorded them they would not have been able to show any facts

constituting a substantial interest or defense. This, of course, is begging the issue. To sustain the denial of a right to plead to the merits the court must assume that petitioners could file a good plea to the merits and must take the bald position that under the circumstances of this case petitioners have been rightly denied opportunity to interpose such valid plea.

The only ground on which the denial of the right to be heard on the merits can ever be justified is that the parties asserting such right have waived it. That the parties here did not waive such right is clear.

Respondents (page 67, their brief) attempt to create the erroneous impression that petitioners did not demand the right to be heard on the merits at the first opportunity after determination of the question of jurisdiction. The court ruled on jurisdiction for the first time July 12, 1937. Instantly leave was asked to plead to the merits but summarily denied.

Although as indicated in objecting to denial of the right to be heard on the merits, it is not incumbent on petitioners to establish the interest that would have been shown had such hearing been accorded, yet petitioners believe that the general nature of such interest is apparent even from the *ex parte* record. There are two general types of interest here involved:

First, the liability of the trustees by reason of the terms of the trust to the beneficiary thereof. One of the principal objects of the trust may readily be inferred as payment for legal services rendered in the contractor's case and in which this escrow fund arose. Thus, Odell as attorney and as an individual and aside from his capacity of trustee, was a beneficiary of the trust.

Second, escrow trustees, Craig, Harris and Odell could not shirk their part of the responsibility for the

proper distribution of funds entrusted to their care as trustees. When the intervening petition was filed, expenses had to be incurred by the escrow trustees in the proper handling of their trust and the protection of the rights of the beneficiaries thereof. It was incumbent upon those trustees to fulfill their obligations to all the contractors they represented in the escrow fund. The trustees had obligations not only to the contractors who were parties to the intervening petitions, but as well to the contractors not parties to the intervening petitions. Trustee Harris had to engage counsel to represent him. The payment for these expenses were as much the duties of the escrow trustees as was the distribution of the balance to the contractors. See: *Taylor* v. *Davis*, 110 U. S. 330, 338.

Point III.

The Circuit Court of Appeals and the trial court committed further errors requiring reversal.

1.

The court erred in entertaining an involuntary petition against a corporation organized not for profit.

Respondents say:

> "* * * the question of whether the bankrupt was or was not a business corporation is a question of jurisdiction of the person, i.e., the bankrupt, and not of the subject matter." (Respondents' brief, page 68.)

It is obvious that respondents' attorney is laboring under a misapprehension. If the alleged bankrupt is not a party susceptible of being adjudicated under the act, there can be no subject matter with respect to it cognizable by a court of bankruptcy. The question is not one of service

upon the bankrupt, but of jurisdiction of the alleged bankruptcy; hence, jurisdiction of the subject matter.

2.

The court erred in determining an intervening controversy when its jurisdiction over the bankruptcy proceeding was in issue and undetermined.

Respondents seek to meet this point by arguing (pages 36-37 their brief) that a court of bankruptcy has *jurisdiction* under some exceptional circumstances to determine collateral controversies prior to adjudication. Petitioners' argument on this point is not directed to the question of jurisdiction, but rather to the question of whether or not the court abused its discretion.

3.

The court disregarded Equity Rule 66 and denied petitioners sufficient time to file exceptions to the Special Master's report.

Respondents contend that Equity Rule 66 is not violated by reducing the twenty days specifically provided for therein to a mere two days even though such reduction of time was made over strenuous objection of petitioners' counsel even if it be assumed the Equity Rule is to be applied only by "analogy", the abuse of discretion is evident.

CONCLUSION.

Now after the filing of all briefs petitioners believe it conclusively appears that:

Neither of the intervening petitions stated a cause of action cognizable in any federal court and the same should have been dismissed on the court's own motion.

The controversy was one between utter strangers to the bankruptcy proceeding.

Petitioners were not agents but were trustees.

Neither the alleged bankrupt nor the court had possession or custody, actual or constructive, of the funds in question.

Petitioners did not, and could not, consent to bankruptcy court jurisdiction over the collateral controversy.

Petitioners were deprived of property without due process of law—an opportunity to be heard on the merits.

The Bankruptcy Act does not extend to a "not for profit" corporation.

Jurisdiction over the collateral matter was assumed by the court before determining whether it had jurisdiction of the subject matter of the alleged bankruptcy.

The court abused its discretion by reducing the time to file objections from the twenty days provided for by rule to two days.

The decisions of the lower courts should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI OR AFFIRM ORDERS OF UNITED STATES CIRCUIT COURT OF APPEALS AND DISTRICT COURT, AND BRIEF IN SUPPORT OF MOTION.

SIGMUND W. DAVID,
Attorney for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 53.

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,

Respondents.

WRIT OF CERTIORARI TO U. S. CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI OR AFFIRM ORDERS OF U. S. CIRCUIT COURT OF APPEALS AND DISTRICT COURT, AND BRIEF IN SUPPORT OF MOTION.

MOTION.

Dahl-Stedman Co., *et al.*, respondents in this cause, by Sigmund W. David, their attorney, move this Honorable Court to dismiss the writ of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, heretofore granted by this Court or, in the alternative, to affirm the orders heretofore entered by the United States Circuit Court of Appeals and the District Court of the United States in this cause, for the reasons that it is manifest that the petition for certiorari was filed for delay only and that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

BRIEF IN SUPPORT OF MOTION.

Opinions Below.

The District Court of the United States, for the Northern District of Illinois, Eastern Division, delivered no opinion.

The opinion of the Circuit Court of Appeals (R. 129.) has been reported in 95 F. (2d) 373.

Statement of the Case.

The petition for writ of certiorari was filed May 19, 1938. Respondents received a copy thereof on May 20th. Respondents desired an immediate disposition of the petition, and, as this Court intended to adjourn on May 31st, respondents thought that the filing of an answer by them might delay an immediate disposition. Also, respondents, upon reading the petition, believed that it presented no ground for the granting of the writ. For these reasons, respondents immediately, (May 20) waived their right to file a reply to the petition.

Upon reconsideration of the petition for certiorari, respondents have concluded that the petition presents such an erroneous statement of the facts in this case and of the legal principles involved that this Court was probably misled by reading the petition alone and not having the benefit of a reply thereto. Respondents further believe that a short and correct statement of the record facts and applicable legal principles will conclusively show that the petition for certiorari was filed for the purpose of delay only, and that no important or substantial legal question is involved in this writ.

The record in this cause consists solely of pleadings and orders. There was no testimony taken and there are no disputed facts. All the record facts are contained in the sworn petitions filed by respondents, the answers thereto of parties other than the petitioners Odell and Harris, the Master's reports, and the District Court's orders. Petitioners Odell and Harris filed *no* pleadings averring any facts or denying any of the facts alleged by respondents.

In spite of this, the statement of the case made by petitioners is incorrect and misleading. In it petitioners have ignored some of the record facts alleged and not denied, have misstated and misinterpreted others, have made some statements neither contained in nor having any basis in the record, and others directly contrary to the record. A correct statement of the case follows.

Respondents, Dahl-Stedman Co., *et al.* (Avery Brundage Co. was originally made a party by inadvertence), (R. 70.) are 277 building contractors, members of various building trade associations. (R. 18-22.) On April 9, 1935, their respective associations made a written agreement on their behalf with the Tax Service Association of Illinois, the bankrupt. In that agreement the bankrupt agreed to act for the members of the Associations, including respondents, to litigate the question whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to the said contractors. (R. 23.) For its services the bankrupt was to be paid $1,500 in advance and an additional specified sum, not to exceed $20,000, if the Supreme Court of Illinois decided that the contractors were exempt from the tax. (R. 23.) The bankrupt agreed to retain the petitioner, Benj. F. J. Odell, as attorney for and on behalf of the contractors, but without expense to them. (R. 23.) The contractors agreed to follow such procedure as might from time to time be recommended by the bankrupt and Odell concerning filing of their monthly tax returns

and the escrowing of their taxes shown in such returns. (R. 23.) The agreement was signed on behalf of the bankrupt by the petitioner Harris, who was then Vice President and later became President of the bankrupt. (R. 24, 9.) Odell signed as follows: "I hereby consent to retention under the terms of this agreement." (R. 25.)

Respondents had no relations with Odell and Harris, except that Odell and Harris were acting for respondents under the terms of the agreement with the bankrupt. (R. 28, 30.) This agreement provided for the establishment of an Escrow Fund in order to carry out the purposes of the agreement. Pursuant to said agreement and the directions of the bankrupt, Harris and Odell, a so-called "escrow" was established at the National Builders Bank of Chicago, and respondents sent to the bankrupt their sales tax returns, both originals and duplicate copies. (R. 26-28.) Pursuant to the directions of the bankrupt, Harris and Odell, respondents made their checks for the monthly taxes payable to the Sales Tax Escrow Fund at the National Builders Bank of Chicago, sent them to the bankrupt, and the bankrupt deposited the checks in that Fund. (R. 26, 28.) The Escrow Fund was established at the bank by a letter dated May 2, 1935, signed by Odell, Harris and Craig, Craig being Secretary of one of the contractors' associations. (R. 27, 28.) This letter said:

> "There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.
>
> "You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated." (R. 27.)

In acting as custodians of this Fund, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt. (R. 28.) The letter to the bank concerning the Escrow Fund expressly stated that Odell and Harris had no personal interest in the Fund but were mere custodians thereof. (R. 27.) Under the agreement of April 9, 1935, which expressly provided for the creation of the Escrow Fund, Odell and Harris were not to get any money, even if the litigation was successful, but the bankrupt was to get $20,000. (R. 23.) At the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Fund, although none of them were then acting for these respondents in any capacity. (R. 28, 30, 31-32.)

Pursuant to the agreement of April 9, 1935, the bankrupt kept books and records showing the amount that each respondent deposited each month in the Escrow Fund. (R. 29.) Some of the originals of the monthly tax returns sent by respondents to the bankrupt, pursuant to the agreement of April 9, 1935, and the directions of the bankrupt, Odell and Harris, were filed with the Illinois Department of Finance. Others of said originals and all of the duplicates were kept by the bankrupt. (R. 26-27.)

Pursuant to the agreement of April 9, 1935, the bankrupt and Odell, on September 4, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, in which these respondents and some other contractors were the plaintiffs. (R. 29.) The suit was for an injunction to restrain the assessment and collection of the sales tax against the plaintiffs, upon the ground that the plaintiffs were exempt from the payment of said tax. (R. 29.) The bill was dismissed and an apppeal was taken to the Supreme Court of Illinois. (R. 29.) In February, 1937, the Illinois Supreme Court de-

cided, *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, against the plaintiffs, holding squarely that the contractors were not exempt from the sales tax. On April 2, 1937, pursuant to the mandate of the Illinois Supreme Court, a decree was entered in the Circuit Court giving the contractors until June 1st to pay their taxes, with interest at 3 per cent, and providing that, if they failed to file their returns and pay their taxes by June 1st, they would be subject to the penalty of 25 per cent plus interest at 5 per cent provided in the Sales Tax Act. (R. 29-30.)

On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a Receiver. (R. 2.) On May 24, 1937, respondents filed their sworn petition. (R. 18.) At that time respondents had over $297,000 of their money in the Escrow Fund and the bankrupt, acting through its agents Odell and Harris, had custody and control of the Escrow Fund and, therefore, of respondents' money. (R. 28, 32.) Craig was willing and desired to release to respondents the money belonging to them in the Escrow Fund. (R. 33.) The bankrupt, Odell and Harris were not, and had refused to release any of it. (R. 32-33.) Many of the original tax returns of respondents and all of their duplicate tax returns, which belonged to them and which they needed in order to determine the amount of their taxes, how much they had in the Escrow Fund and how much was due to the State, etc., were in the possession of the bankrupt and its agents Odell and Harris (R. 33-34), who had refused to turn them over to respondents or to the Receiver of the bankrupt. (R. 32-33.) The books and records of the bankrupt showing the amount that each respondent had deposited each month in the Escrow Fund were in the possession of the bankrupt and its agents Odell and Harris, and they had refused to turn them over either to the respondents or to the Receiver. (R. 33.)

Respondents' petition filed May 24, 1937, averred all of the foregoing facts and prayed that respondents' money in the Escrow Fund, which was in the custody and control of the bankrupt and its agents Odell and Harris, be turned over to respondents; that respondents' original tax returns which had not been filed, and all of respondents' duplicate tax returns, which they had delivered to the bankrupt and which were in the possession of the bankrupt and its agents Odell and Harris, be turned over to respondents; and that the books and records of the bankrupt showing the amount each respondent had deposited in the Escrow Fund, which were in the possession of the bankrupt and its agents Odell and Harris, be delivered to the Receiver and made available for inspection by respondents. (R. 18-38.)

Due notice of the presentation of this petition was given to the Receiver of the bankrupt, the bankrupt, Harris, Odell, Craig and the National Builders Bank of Chicago. *Without objection from any of them,* the District Court entered an order on May 24th giving leave to respondents to file their petition, making the above named parties respondents to the petition, and ordering them to file their answers to the petition by May 27, 1937, and that the matter be set for hearing upon the petition and answers on May 27, 1937. (R. 17, 18.)

Upon agreement and approval in writing by respondents, the petitioning creditors, the Receiver, the bankrupt, the National Builders Bank, Odell, Harris and Craig, the District Court entered its order of May 27, 1937. (R. 39-41.) The order states that all parties had agreed in open court that the court had jurisdiction to enter the order. (R. 39.) In the order it was agreed that there was $314,885.95 in the Sales Tax Escrow Fund, as alleged in the petition of these respondents; (R. 39.) that the greater portion of it represented the proceeds of checks deposited in the Fund by respondents, and the balance of it represented the pro-

ceeds of checks deposited by other contractors represented by Odell; (R. 39.) and that Odell agreed to the order not merely for himself, as respondent to said petition, but also on behalf of the contractors represented by him. (R. 40.) It was ordered by the District Court that out of the Sales Tax Escrow Fund there be paid *instanter* to the Department of Finance of the State of Illinois 75 per cent of the proceeds of checks of each of the respondents herein and each other contractor deposited in said Fund, plus interest thereon, said 75 per cent plus interest amounting to $242,200; that Odell, Harris and Craig sign *instanter* a joint check for $242,200 payable to the Department of Finance, and that the National Builders Bank of Chicago honor and pay said check out of the Sales Tax Escrow Fund; that within 5 days these respondents furnish to the petitioners herein an itemized statement showing the amount that each of these respondents claimed to have deposited in said Fund; that said list and the amounts thereof be checked and examined by Odell; that he report the result thereof to the attorney for these respondents, and that, if there be any differences in the figures furnished by these respondents and the figures in the hands of said Odell, said differences be determined by the court; *"that the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank amounting to $72,685.96 shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court * * *; that all claims and rights in and to said balance of $72,685.96 in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan upon petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."* (R. 39-41.)

The bank's answer to the petition admitted the amount in the Sales Tax Escrow Fund and "disclaimed all interest

in the other allegations in the petition." (R. 46.) Craig answered that he was ready, willing and eager to comply with any request of these respondents in regard to the disposition of the moneys deposited by them in the bank and to release or disburse said moneys in said Fund in accordance with these respondents' desire. (R. 47.) The Receiver of the bankrupt answered that he had in his possession none of the documents referred to in the petition; that the checks of these respondents deposited in the Escrow Fund were deposited not only for the purpose of having on hand and available sufficient moneys to pay the taxes on respondents' returns, if it was decided that these respondents were not exempt from said tax, but also for the purpose of assuring payment to the bankrupt of such amount as might be due it under the agreement of April 9, 1935, in the event of a favorable decision; that the portion of the Sales Tax Escrow Fund on deposit with the bank which was furnished by these respondents was subject to the jurisdiction and order of the court; (R. 50) that he, as Receiver of the bankrupt, was entitled to the possession of all the originals and duplicate returns of these respondents in the possession of the bankrupt and Odell and Harris, and all the books, records and accounts of the bankrupt showing how much was deposited in the Escrow Fund by these respondents, which were in the possession of the bankrupt, Odell and Harris, and that they had not been turned over to him; and that he as Receiver had an interest in the moneys deposited in the Sales Tax Escrow Fund in an amount not to exceed $20,000. (R. 51, 52.)

At the time the agreed order of May 27, 1937, was entered, there was a motion of the bankrupt pending to quash the service of process upon the bankrupt, alleging lack of jurisdiction of the court over the bankrupt because of alleged defective service. (R. 6.) Odell, Harris and the bankrupt filed pleas to respondents' petition of May 24, 1937,

on June 3, 1937. These pleas alleged that the District Court was without jurisdiction to determine any rights relating to the petition of these respondents while the question of the court's "bankruptcy jurisdiction" over the bankrupt was pending undetermined because of the pendency of the bankrupt's motion to quash the service upon it. (R. 54-56.) On June 29th the District Court denied the bankrupt's motion to quash the service of process, struck its special appearance, and ordered and decreed that the bankrupt had appeared in the cause generally and that the court had jurisdiction to determine the merits of the cause, (R. 75-76.) and ordered the bankrupt to file its answer on the merits, which the bankrupt did on July 2nd. (R. 77.)

After this order of June 29th was entered, these respondents filed their petition of June 29, 1937. On that day the remaining balance in the Sales Tax Escrow Fund was in the custody and under the control of the District Court, as it had been in the possession and control of the bankrupt and its agents when the bankruptcy petition was filed, and the Court's *custodia legis* had been acknowledged and confirmed by all parties in the agreed and approved order of May 27, 1937. (R. 41.) By the terms of the letter of April 2, 1935, relating to the Escrow, there was required for withdrawal of the Fund from the bank the joint signatures of Craig and the bankrupt's agents Odell and Harris. Craig had put himself on record that he had no interest in the Fund and was willing to turn it over to these respondents. (R. 47.) Odell and Harris had no interest personally in the Fund. (R. 27; 39-40.) Over $68,580 of the $72,758 in the fund belonged to these respondents. (R. 70, 71, 97.) This had been ascertained by checking and verifying, pursuant to paragraph 3 of the agreed order of May 27, 1937, (R. 40.) the amount each of these respondents had deposited in the Fund. (R. 70, 71.) The Receiver of the bankrupt claimed that by reason of the agreement of April 9,

1935, he was entitled to $20,000 of this Fund. $48,580.40 of the Fund belonged to these respondents, free of any claim of anyone. These respondents' petition set forth all of the above facts, (R. 69-72.) and asked that this $48,580.40 be turned over to them, leaving $20,000 of their money in the Fund so that any claims of anybody arising out of the agreement of April 9, 1935, might be reserved and later adjudicated. (R. 71-72.)

No one objected to the petition or to these respondents' getting this $48,580.40 except the bankrupt (which did not stand on its objections) and Odell and Harris. (R. 74, 97.) The court directed Odell and Harris to answer the petition, and each of them stated that they did not desire to answer it. (R. 74.) The motion of the bankrupt to quash service upon it had been overruled and the court had taken jurisdiction of the bankruptcy petition on the merits. Odell's special answer and Harris' motion to strike these respondents' petition of May 24, 1937, were based solely upon the pendency of the bankrupt's motion to quash service. In spite of this, Odell requested that his special answer to these respondents' petition of May 24th, and Harris requested that his motion to strike said petition of May 24th, stand as their respective answers to these respondents' petition of June 29th. (R. 74.) There was thus no question of jurisdiction before the court presented by Odell's and Harris' answers to these respondents' petition of June 29th. The court expressly invited Odell and Harris to answer this petition on the merits, but they insisted that they wanted to stand on their special answers of alleged lack of jurisdiction. Since, under these circumstances, there was no question presented to the court or, at the most, merely a question of law, the District Court could and should have acted on these respondents' petition *instanter*. However, it referred the matter to a Referee, acting as a Special Master. (R. 73-75.)

The Referee filed his report on July 7th. (R. 78-88.) Odell and Harris asked and obtained leave to file their exceptions to the report, and filed the same. (R. 92.) After consideration of the exceptions, the District Court entered its order of July 12, 1937, which is one of the orders appealed from. (R. 96-99.) In this order the Court found that the allegations of these respondents' petition of June 29th were true; that the Court had jurisdiction over the Escrow Fund and of the parties thereto, including Odell, Harris, Craig, the bankrupt and the bank; that there was $68,580.40 in the Escrow Fund which was the proceeds of checks of these respondents deposited in the Fund, and that of said $68,580.40, $48,580.40 was the money of and belonged to these respondents, free from any claim or demand of any kind whatsoever of any of the parties including the bankrupt, the Receiver, Odell, Harris, Craig and the National Builders Bank; and that George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, were authorized to receive on behalf of these respondents the money belonging to respondents in the Fund. The court thereupon ordered that the exceptions of Odell and Harris be overruled and that Odell, Harris and Craig sign a joint check on the Fund for $48,580.40 and deliver it to these respondents, and that after the payment of said check the balance remaining in said Fund amounting to $24,178.35, should remain and be held in the Fund subject to the further order of the Court. (R. 96-99.) Odell's and Harris' motion to file a second supplemental answer was denied. (R. 96.)

On July 13th, on motion of these respondents, the Court ordered Odell and Harris and the bankrupt to answer to the merits concerning the $20,000, which these respondents and the Receiver of the bankrupt both claimed and which was the limit of any claim, no matter how unfounded or chimerical, which Odell and Harris might have against the

Escrow Fund, and which $20,000 had been left subject to the further order of the court. (R. 99-100.) Given the opportunity to answer to the merits concerning, or state the basis of any claim they might have to the $20,000, Odell and Harris refused to do so and filed a "special answer," merely reasserting that the court had no jurisdiction over the Fund. (R. 110.) Odell and Harris appealed from this order of July 13th as well as that of July 12th.

The Circuit Court of Appeals affirmed with costs the orders appealed from, (R. 134.) denied petitioners' petition for rehearing, and ordered that petitioners pay to respondents interest on $48,580.40 at the rate of 5 per cent per annum from July 12, 1937, until said $48,580.40 is paid. (R. 197.)

The above statement of facts is accurate and presents fairly all the record facts. It is therefore not our intention to direct attention in detail to all of the misstatements and omissions of record facts and the deliberate attempt to confuse this Court, contained in the petition for writ of certiorari. However, as the writ was granted upon the face of the petition, the nature of the petition and the lack of good faith of petitioners in filing it may be observed from just a few of the statements contained in the petition. For instance:

Petitioners claim and stress the fact that after the agreement of April 9, 1935, numerous contractors, by separate written contracts, separately engaged Odell to represent them and that, by reason of these separate engagements, he is entitled to a lien on the Escrow Fund. (Petition for certiorari, pp. 2, 24.) To support this, petitioners annex an appendix (p. 33) purporting to exhibit one such contract. No such claim of a lien and no such contract appear in the record in the District Court.

Petitioners assert (Petition for certiorari, pp. 3, 24) that

the Supreme Court of Illinois decided *in favor of* the contractors in the case of *Blome Co.* v. *Ames,* 365 Ill. 456; that thereupon the Illinois Department of Finance was compelled to change its rulings, and subsequently the Illinois Supreme Court in *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600, voluntarily modified its decision, and thus, as a result of the efforts of Odell, the respondents are now exempt from the sales tax. Not one of these statements is true. The contractors' suit was decided *against* the contractors. The case of *Blome Co.* v. *Ames,* 365 Ill. 456, held that the contractors were not exempt from the tax. A reading of the opinion in that case is all that is necessary to determine that fact. After a final decree was entered in the *Blome* case, the contractors, with the consent and approval of Odell, paid to the State $242,200 on account of the taxes from which petitioners now assert Odell was successful in having the contractors held exempt. (R. 39, 69-71.) In December, 1937, six months after the orders here appealed from were entered by the District Court, the Illinois Supreme Court rendered its decision in the case of *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600. The *Herlihy* case had no connection with the *Blome* case, none of these respondents were parties to the *Herlihy* case, and Mr. Odell had no connection therewith either as party or attorney.

Petitioners reiterate (Petition for Certiorari, pp. 5, 6, 26) that the order of June 29, 1937, which found that the petitioners did not desire to answer these respondents' petition, etc., was a purported order obtained under most unusual circumstances by the attorney for these respondents, and was false. This assertion accusing respondents' attorney of unprofessional conduct is utterly baseless and has no support whatsoever in the record. Petitioners made no attempt at any time to correct this alleged false and fraudulent order; they did file exceptions to the Master's

report, in which they made a similar assertion about the order, and these exceptions the District Court overruled. (R. 92, 96.) This brazen and baseless charge against counsel for respondents comes with total disregard of the proprieties due to this Court and an attorney privileged to practice before it, and it comes from a lawyer whose unethical conduct has recently been severely censured. See

Odell v. *Bausch & Lomb Optical Co., et al.*, (C. C. A. 7th Cir.) 91 F. (2d) 359; certiorari denied 302 U. S. 756, 780; 82 L. Ed. 232, 347.

Petitioners stated in their Petition for Certiorari (pp. 22, 23) and made it appear as if such statement was based upon the record, that the order of May 27th was entered at the solicitation and suggestion of the District Court, and that it was agreed in open court that the consent to the distribution would not jeopardize the petitioners' rights to have determined the question of the jurisdiction of the Court over the 25 per cent balance of the Escrow Fund. This is untrue and in direct contradiction to the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement made. On the contrary, the order itself, which was agreed to and approved by the petitioners in writing, expressly provided that the Court take jurisdiction and determine the distribution of the balance of the Fund. (R. 4[illegible].)

The Petition for Certiorari states (p. 5) that on June 29, 1937, respondents abandoned their petition of May 24th. The record shows the contrary; respondents' petition of June 29th was based upon and supplementary to their petition of May 24th. (R. 69-72, 99, 100.)

Petitioners insist that the bankrupt was not a moneyed, business or commercial corporation and, therefore, the court had no jurisdiction over it, that there was no adjudi-

cation of the bankrupt, and these points are the subject matter of two of their legal arguments. (Petition for Certiorari, pp. 4, 29.) Petitioners did not think it was necessary to inform this Court that before they filed their petition for certiorari the Special Master had reported to the District Court that "certainly there was nothing eleemosynary in and about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter"; (R. 178.) that on April 27, 1938, the District Court approved the Master's report, specifically found that the alleged bankrupt was and is a moneyed business or commercial corporation amenable to an involuntary petition in bankruptcy, and adjudicated it a bankrupt; and that no appeal or review of such order has ever been sought. (Appendix A, *infra*, p. 40.)

Reasons for Granting Respondents' Motion.

1. No substantial question of law is involved in this cause. The facts are undisputed, and if the undisputed facts are considered the legal questions presented by the petition for a writ of certiorari are trivial.

2. No real, but only a pretended, question of jurisdiction exists in this case.

(a) This case is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate and in which the bankrupt has no interest. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, (1) was in the legal possession and actual control of the

bankrupt and its agents, Odell and Harris; and (2) part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt.

(b) With the consent of all parties, including the petitioners, the Escrow Fund came into *custodia legis* of the District Court, and with the consent of all parties, including petitioners, the greater part of the Escrow Fund was distributed and the balance was left subject to the further order of the District Court. After the District Court denied the bankrupt's motion to quash service upon it, no possible question of the jurisdiction of the court over the parties or the balance of the Escrow Fund remained. The order of July 12, 1937, merely distributed part of the balance of the Fund and the order of July 13, 1937, merely ordered petitioners to plead any interest they might have in the $20,000 remaining in the Fund.

3. The appeal to the Circuit Court of Appeals and the petition for a writ of certiorari to this Court were filed for delay only. Petitioners, Odell and Harris, were, at the most, mere stakeholders or custodians of that part of the Escrow Fund they had been ordered to distribute to its owners, and had no other interest therein and, therefore, have no appealable interest.

4. At no step in the proceedings did the District Court abuse its discretion or deny petitioners any legal rights.

5. The decision of the Circuit Court of Appeals presents no important question of general law or of particular interest, nor is that decision in conflict with any decision of any Court of Appeals or of this Court, nor does the decision involve an important question of general or federal or bankruptcy law which this Court has not decided.

SUMMARY OF ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

A. A bankruptcy court has full and complete jurisdiction over the property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

Page v. *Arkansas Natural Gas Corp.*, (C. C. A. 8th Cir.), 53 F. (2d) 27, 33; affirmed in 286 U. S. 269, 76 L. Ed. 1096.

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied 282 U. S. 848, 75 L. Ed. 752.

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent*, 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402, 406.

In re Kerr, 5 F. Supp. 898, 899.

In re Wein, 13 F. (2d) 426, 427.

Remington on Bankruptcy (4th Ed. 1936), Vol. 5, p. 554.

B. The orders appealed from concern an Escrow Fund. That Fund was in the legal possession and actual control of the bankrupt and its agents Odell and Harris when the bankruptcy petition was filed; and part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt.

C. Petitioners agreed on May 27th to the Court's jurisdiction over them and the Escrow Fund and to the Court's distributing the Fund. Afterwards, on June 3rd, they filed special pleas of lack of jurisdiction of the Court because of the pendency of the bankrupt's motion to quash the service upon it. When that motion to quash was denied on June 29th, no possible question of the Court's jurisdiction of the parties or the balance of the Escrow Fund remained.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and 13, 1937.

McGowan v. *Parish*, 237 U. S. 285; 59 L. Ed. 955.

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 587.

Page v. *Arkansas Natural Gas Corp.* (C. C. A. 8th Cir.), 53 F. (2d) 27, 35, affirmed in 286 U. S. 269, 76 L. Ed. 1096.

Bullard v. *Commissioner* (C. C. A. 7th Cir. 1937), 90 F. (2d) 144, 147.

Bachman v. *McCluer*, (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re Bacon, (C. C. A. 2nd Cir. 1908), 159 F. 424, 426.

In re Rockford Produce & Sales Co. (C. C. A. 7th Cir. 1921), 275 F. 811, 814.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936), Vol. 5, p. 330.

A. Odell and Harris expressly agreed that the District Court had the right and authority to determine rights in and claims to the Escrow Fund and to distribute it (which is all the orders appealed from attempt to do or do). They complied with the order of the Court, distributing over 75% of the Fund. They turned over the custody and control of the balance of the Fund from themselves, as agents of the bankrupt, to the Court.

Having done these things, they are estopped from claiming that the Court had no "jurisdiction" to distribute to respondents that part of the balance of the Fund which belonged to respondents and to which no other person had any claim.

B. Petitioners cannot, in June, 1937, object to the jurisdiction of the Court when in May, 1937, they expressly agreed that the Court had that identical jurisdiction and joined in inducing the Court to enter its order, which it could not have entered unless it had jurisdiction. But, even if the Court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction, such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

III.

The Appeal to the Circuit Court of Appeals and the Petition for a Writ of Certiorari to This Court Were Filed for Delay Only. Petitioners Odell and Harris Were at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Had Been Ordered to Distribute to Its Owners, and Had No Other Interest Therein and, Therefore, Have No Appealable Interest.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

Irrespective of the consent of petitioners to jurisdiction or the estoppel against them to deny it, the District Court had jurisdiction to enter the orders of May 27, July 12, and July 13, 1937. In essence, this was a simple reclamation suit. These respondents were the owners of property (their Sales Tax returns and their money in an Escrow Fund) they desired to reclaim. Their property was in the custody and control of the bankrupt and its agents Odell and Harris. (R. 18-37.) The Receivers of the bankrupt claimed that part of the property (*i. e.*, the Sales Tax returns and part of the Fund) belonged to him and that all the property was under the jurisdiction of the Court. (R. 48-53.) The bankrupt and its agents Odell and Harris had refused to turn respondents' property over to respondents or to the Receiver. (R. 31-34.)

A bankruptcy court unquestionably has jurisdiction of property in the custody or control of a bankrupt or its agent at the time a petition for bankruptcy is filed. The facts which gave the Court jurisdiction were alleged in respondents' original petition filed May 24, 1937, (R. 18-38.) and were never denied by any of the parties, including petitioners. On the contrary, all the parties conceded the existence of these jurisdictional facts by their consent to both the findings of fact and the decretal part of the District Court's order of May 27, 1937. (R. 39-41.)

The rule of law that the District Court has jurisdiction of property which is in the possession, control or custody of the bankrupt or its agent at the time of the filing of the petition in bankruptcy has often been announced by this Court and other Federal Courts. The rule is well stated in

Page v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27; affirmed 286 U. S. 269,

where the court said, p. 33:

> "So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or *by the bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property', and the property comes into its '*custodia legis*', if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy or of the trustee, marshal, referee, *bankrupt, bankrupt's agent*, or of someone not claiming beneficial interest." * * * (Italics ours.)

One of the most thorough discussions of this rule is contained in the case of

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied 282 U. S. 848, 75 L. Ed. 752,

citing many cases decided by this Court. The Gamble case decided that the jurisdiction of a bankruptcy court over property is determined by the fact that the property is in the possession of the bankrupt or its agent at the time the petition in bankruptcy is filed; that such possession need not be actual, but may be constructive; that such constructive possession exists in many instances, such as when the property is in the control or the custody of the bankrupt's agent, or of one who makes a claim to the property which

claim is colorable only, or where it is held by someone for the account of the bankrupt, etc., and that when the Court has jurisdiction over such property it has the jurisdiction by summary proceedings to adjudicate the rights of various parties in and all claims to said property.

To the same effect see

Taubel-Scott-Kitzmiller Co. v. *Fox,* 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent,* 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher,* 216 U. S. 102; 54 L. Ed. 402, 406.

In re Kerr, 5 F. Supp. 898.

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, p. 554.

Petitioners claim that a bankruptcy court has jurisdiction only of property which is in the physical possession of an officer of the court or deposited in court, and to determine controversies only over property which belongs to the bankrupt. These assertions are refuted by the cases cited above. If a bankruptcy court had jurisdiction only over the bankrupt's property, then it would have no jurisdiction over reclamation proceedings. As was said by the court in

Gamble v. *Daniel,* 39 F. (2d) 447,

p. 454:

> "Administration of property by a bankruptcy court involves several elements. One of these is collection of the property of the bankrupt. In that sense, the bankruptcy court has jurisdiction (as above shown) to administer on all property in actual or constructive possession of the bankrupt at the time the petition is filed. Such jurisdiction is the power to determine what title or right or interest the bankrupt may have

> therein and make orders in pursuance of such determination. This exists irrespective of the character of title, right, or interest claimed therein by others, and has often been exercised where the claim was that the bankrupt held as Trustee.'

In the instant case, not only were the entire Escrow Fund and the Sales Tax returns of respondents in the possession, control and custody of the bankrupt and its agents Odell and Harris, but the bankrupt, through its Receiver, claimed that $20,000 of the Escrow Fund was the property of the bankrupt and possession of the returns belonged to the Receiver. Petitioners raise only a pretended, not a real, question of jurisdiction. Their claim of no jurisdiction ignores the record facts and is based upon the theory that neither Odell nor Harris were agents of the bankrupt and that the bankrupt had nothing to do with the Escrow Fund. The record facts are to the contrary. A reading of respondents' petition, (R. 18-38.) particularly the contract between the bankrupt and respondents (R. 22-25.) and the letter establishing the Escrow Fund (R. 27-28.) will suffice to prove that the Escrow Fund, immediately upon the filing of the petition in bankruptcy, was in *custodia legis* of the Court because it was then in the custody and control of the bankrupt and its agents. The Escrow Fund was part and parcel of the entire plan agreed upon in the contract of April 9, 1935, in which the bankrupt was one party, these respondents the other and Odell was the agent selected by the bankrupt for the purpose of enabling the bankrupt to make $20,000. (R. 23-26.) The Escrow Fund was established pursuant to the agreement between these respondents and the bankrupt; respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in it pursuant to the suggestion and request of the bankrupt and Harris and Odell. Odell's and Harris' relations and connection with these respond-

ents were created and limited solely by the agreement of April 9, 1935, and the approval of Odell's engagement as attorney executed by some of the respondents pursuant thereto. (R. 25, 28.)

The cases upon which petitioners rely do not disagree with the principles of law stated above. They are not applicable to the facts in the instant case.

Petitioners never attempted to plead any fact tending to show that the District Court did not have jurisdiction. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. Even a third party or an adverse claimant may be ordered by a bankruptcy court to turn over property on a summary proceeding when he has done nothing more than to question jurisdiction. See

In re Wein, 13 F. (2d) 426.
Gamble v. *Daniel*, 39 F. (2d) 447.
In re Silverman, 299 F. 959.
Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402.
May v. *Henderson*, 268 U. S. 108; 69 L. Ed. 870, 874.

The petition for certiorari makes the claim that a bankruptcy court has jurisdiction only over controversies relating to the property of a bankrupt, and that there is no bankrupt until there is an adjudication. The rule necessarily is to the contrary. As was said in

8 Corpus Juris Secundum, Bankruptcy, Sec. 153, p. 600:

"Third persons having an adverse claim or title giving them the right to possession of property which has come into the custody or control of a bankruptcy court pending an adjudication may assert such title and claim possession of such property by proper pro-

ceedings in the bankruptcy court; but this is the only way in which such claims can be asserted, as the bankruptcy court, by reason of its possession of the property, acquires exclusive jurisdiction to pass thereon."

* * * * * *

"Where several conflicting claims are asserted to property in the possession of a bankruptcy receiver, the bankruptcy court thereby acquires jurisdiction to determine the rights of the respective claimants in the property although the receiver cannot possibly have any interest therein."

See also

5 Remington on Bankruptcy, 4th Ed. 1936, p. 580.

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir., 1932) 58 F. (2d) 721.

In re J. C. Winship Co., (C. C. A. 7th Cir., 1903) 120 F. 93, 96.

Denton v. *Gurnett & Co.*, 69 F. (2d) 750.

Even if the orders of the District Court were premature because there had been no adjudication when they were entered, no useful purpose would be served by reversing them except to afford petitioners further delay in turning over to respondents their property. Petitioners failed to inform this Court that before their petition for certiorari was filed in this Court there was an adjudication of the bankrupt from which no appeal has been sought. (Appendix, *infra*, p. 40.)

The District Court not only had jurisdiction of the Escrow Fund, the Sales Tax returns and records, but it is the only Court which had jurisdiction and to which respondents could have resorted. Had respondents instituted proceedings in any other court, the District Court undoubtedly would have restrained them.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

Petitioners, together with the other parties interested in the bankruptcy proceedings, approved of and agreed to the order of May 27, 1937, which found that the District Court had jurisdiction of the Escrow Fund and the parties thereto and over the distribution of the entire Fund, including that part of it remaining after the payment of 75% to the Illinois Department of Finance. (R. 39-41.) Petitioners complied with the order of May 27th by (1) distributing 75% of the Fund, and (2) checking the amount that each of the respondents claimed to have deposited in said Fund. (R. 70, 79, 87.) Petitioners now object to the entry of the orders of July 12, and July 13, 1937, on the ground that the Court had no jurisdiction to order distribution of any part of the Escrow Fund. Thus, their appeal is based on an objection to an action of the Court which they expressly consented to, approved of and participated in. Courts have invariably held that under such circumstances a party is estopped from appealing and that the order appealed from should be affirmed without consideration of the merits of the cause. A leading case which presented a situation almost identical to that of the instant case is

McGowan v. *Parish*, 237 U. S. 287; 59 L. Ed. 955.

In that case plaintiff's testators were attorneys who had been retained on a contingent fee basis to enforce a claim against the United States. After they had rendered services, their client discharged them and retained other attorneys who finally had the claim allowed. The

original attorneys thereupon instituted a suit in equity tying up the sum awarded to their former client and making the Secretary of the Treasury and the Treasurer of the United States parties defendant. A consent decree was entered by which all of the fund, except that which the original attorneys claimed, was paid to the client and the balance which was claimed by the original attorneys placed in a bank subject to the further order of the Court. In the suit to determine who was entitled to said balance of the fund, the defendant raised the question of the Court's jurisdiction over the fund.

The Court held that the objection of jurisdiction over the fund had been waived by the defendant by its consent to the decree ordering distribution of part of the fund to the defendant and that the balance be held subject to the order of the Court, and that this decree amounted to a waiver of jurisdictional questions.

The Court further held that no issue other than the one previously reserved by the consent decree could be raised by the defendant in her answer to the bill of complaint.

In *Bullard* v. *Commissioner of Internal Revenue*, (C. C. A. 7th Cir. 1937) 90 F. (2d) 144,

the Court said:

"• • • In (Freeman on Judgments) volume 2 (5th Ed.) Sec. 663, it is said: 'The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under the same circumstances and to the same extent as any other judgment.' In *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 684, 49 L. Ed. 1066, the court said: 'The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree in invitum. *Knobloch* v. *Mueller*, 123 Ill. 554, 17 N. E. 696; *O'Connell* v. *Chicago Terminal Transfer R. Co.*, 184 Ill. 308,

325, 56 N. E. 355.' In *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 314, 72 L. Ed. 587, the court adhered to the rule in the following language: 'But "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause" *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 28 L. Ed. 971. Compare *United States* v *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 35 S. Ct. 543, 59 L. Ed. 955 * * *.'"

Petitioners contend that jurisdiction cannot be conferred by consent. In certain cases that is true. For instance, where jurisdiction is based on diversity of citizenship and where the record affirmatively shows that there was no diversity, that rule has been frequently applied. Such are most of the cases cited by petitioners. That is not the situation here. Here the record facts showed affirmatively that the Court did have jurisdiction of the Escrow Fund. However, any question of jurisdiction of the Court that could have been raised by any party based on any forced construction or interpretation of the undisputed facts alleged was expressly waived by the order of May 27th approved and consented to by all parties, including petitioners.

The same argument now made by petitioners was made by the defendants in the leading case of

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 578.

This Court said, L. Ed. p. 596:

"Decrees entered by consent have been reviewed upon appeal or a bill of review where there was a claim of lack of consent to the decree's entry; * * * or a fraud in its procurement; * * * or that there was a lack of Federal jurisdiction because of citizenship of the parties; * * * but a decree 'which appears

by the record to have been rendered by consent is always confirmed without considering the merits of the cause'." * * *

And, on p. 597:

"It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent. * * * The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. * * * If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal. Such an error is waived by the consent to the decree. *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 59 L. Ed. 955, 963, 35 Sup. Ct. Rep. 543. Clearly it does not go to the power of the court to adjudicate between the parties." * * *

"It is contended that even if the decree is not void as a whole, parts of it must be set aside as being in excess of the court's jurisdiction. * * * Moreover, the defendants, by their consent, lost the opportunity of raising the question on appeal. * * *;"

On May 24th the first order on these respondents' petition of that date was entered without objection from petitioners. (R. 17-18.) On May 27th the second order was entered with the approval and consent of all parties, including petitioners. The same day petitioners complied with that part of the order of May 27th directing them to distribute 75% of the Escrow Fund. Afterwards, in the pleadings filed by petitioners on June 3rd, they questioned only the right of the Court to distribute the Fund while there was pending the motion of the bankrupt to quash service upon it. (R. 54-56.) This motion was overruled on June 29th. (R. 75.) Thereupon these respondents petitioned that the part of the balance of the

Fund, to which no claim had been made, be distributed to them. (R. 69-73.) Petitioners declined to plead to the merits of this petition but insisted that the Court had no jurisdiction to distribute the Fund because of defective service of process upon the bankrupt. (R. 73-74.) They reiterated a claim that had already been adjudicated, and presented no facts. Even had they presented facts to the Court showing that they were adverse claimants, which they never did, the Court would have had full jurisdiction and power to enter the orders of July 12th and 13th.

Thus, in

Page v. *Arkansas Natural Gas Corporation*, (C. C. A. 8th Cir.) 53 F. (2d) 27, affirmed in 286 U. S. 269, 76 L. Ed. 1096,

the Court said, p. 35:

> "In 5 Remington on Bankruptcy, Sec. 2195, p. 280, it is said: 'Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interest in the property, may be tried out in the bankruptcy proceedings.'
>
> "Further, no objection to the form of proceeding appears to have been taken until too late."

To the same effect see:

Bachman v. *McCluer* (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936) Vol. 5, p. 330.

But, say petitioners in their petition, (pp. 22-23.) assuming arguendo that jurisdiction can be conferred by consent, we did not consent. We approved of and agreed to the order of May 27th, but the order does not mean what it says and, therefore, we consented to what it means and not to what it says. And to prove that the order does not mean what it says they permit—to speak mildly—their imaginations to run riot, as was pointed out by us on page 15.

Under the facts in this case and the law applicable thereto, petitioners are estopped to complain of or appeal from the orders of July 12, and July 13, 1937.

III.

The Appeal to the Circuit Court of Appeals and the Petition for a Writ of Certiorari to This Court Were Filed for Delay Only. Petitioners Odell and Harris Were at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Had Been Ordered to Distribute to Its Owners, and Had No Other Interest Therein and, Therefore Have No Appealable Interest.

Mere custodians or stakeholders of a fund who have no personal interest therein have no appealable interest in a decree ordering them to distribute the fund. It appears from the undisputed facts in this record that petitioners have no personal interest in the Escrow Fund, part of which they were ordered to distribute by the order from which they appeal. The undisputed facts prove that they are mere naked custodians or stakeholders. (R. 27, 34, 39-40, 96-99.)

In the letter creating the Escrow Fund, Odell and Harris said "the funds are not the funds of the undersigned but are under the custody and control of the undersigned."

(R. 23, 27.) The consent order of May 27th found that the Escrow Fund consisted of money which belonged to respondents and to other contractors represented by Odell (R. 39-40) and, therefore, that petitioners had no personal interest therein. Nowhere is there any finding, or can any inference be drawn from any pleading or finding in the entire record that petitioners had any interest in the Escrow Fund other than as naked custodians thereof.

Petitioners say, however, that, had they not been deprived of the right to plead to the merits, they would have shown that they were not mere stakeholders or custodians of this Fund. Concerning this the Court of Appeals said:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have exerted such claim. It cannot be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record that they could have no interest or claim for services rendered in connection with the litigation of the matter of the Sales Tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without costs to appellees." (R. 133.)

Petitioners have no interest in the Fund ordered to be distributed. They therefore have no appealable interest, and no right to appeal.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

Even petitioners' statement in their petition for certiorari as to what they would have shown had they not been deprived of pleading to the merits (petition, p. 24) shows that they have no interest in the Fund except as naked custodians thereof.

For instance, respondents have admitted that as escrow officers they were trustees of the Escrow Fund. (R. 168.) If they are trustees of a Fund belonging to over 300 contractors, then, under no legal theory has Odell a lien on or an interest in the Fund, merely because he may have claims for legal services against some of the owners of the Fund arising out of personal contracts between them and him having no connection with the Fund. See

Lewis v. *Canadian Pacific Railway Co., et al.*, (C. C. A. 7th Cir. 1930), 39 F. (2d) 834.

Story v. *Hull et al.*, 143 Ill. 506.

Petitioners say there is an injunction pending in another court. Of course, this is totally outside the record, but if such an injunction existed and was of any force, why were petitioners willing to and why did they deliberately violate it by distributing $242,200 of the Fund?

Respondents submit that the character of petitioners' petition for certiorari is confirmation of the fact that petitioners' petition was frivolous and has been pursued solely for the purpose of delay. The Circuit Court of Appeals ordered that petitioners pay interest on this money they had withheld since July 12, 1937. This order must have been based on the conclusion that petitioners' appeal to the Circuit Court of Appeals was frivolous and devoid of any substantial merit. It may be asked why petitioners

have pursued their course of delay. We suggest that it is a fair inference that they have attempted to delay the distribution of money in which they have no interest and cause annoyance and expense to the owners thereof, in the hope that their tactics may ultimately result in some material advantage to them.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

Petitioners charge that the District Court deprived them of a hearing on the merits, abused its discretion in disregarding equity and bankruptcy rules, that confusion and misunderstanding existed between the Referee and the Court, that the attorney for respondents was guilty of unethical conduct, that the District Court approved of false orders, that the Circuit Court of Appeals made findings of fact without any basis therefor—all without anything in the record to support their assertions.

Even if all these charges were true, they presented no substantial question of general law upon which this Court has not passed, or concerning which there is conflict between various Courts of Appeal.

Their charges are without basis in record facts. Most of them are predicated upon the charge that the order of June 29th (R. 73-74) was a false order. We have previously remarked about this assertion, *supra*, p. 14.

This is what the record shows: On May 27th petitioners agreed that the Court had jurisdiction over the Fund. On June 3rd they filed a special claim of lack of jurisdiction because there was still pending undisposed of a motion of the bankrupt to quash service upon it. On June 29th the Court overruled this motion and decreed that the bankrupt

had appeared in the cause generally and the Court had jurisdiction to determine the merits of the cause. (R. 75, 76.) Then respondents' petition of June 29th was filed. No one except Odell and Harris objected to the entry of an order in accordance with the prayer of the petition. (R. 74, 97.) The Court directed Odell and Harris to answer to the merits of the petition. They said they did not desire to do so but to stand on the same pleas they had filed to the petition of May 24th. (R. 74.) The Court said in substance: "But I have decided that question of jurisdiction and I therefore direct you to plead to the merits." Odell and Harris refused to plead. There was nothing then before the Court except a question of law that the Court had already decided. However, he gave the petitioners full opportunity to argue the matter before the Master. When the Master made his report, Odell and Harris asked leave to file exceptions, and filed them. (R. 97.) The exceptions were considered and overruled. (R. 98.) Even then, no motion was made to file an answer on the merits. Petitioners asked leave to file a second amended supplemental answer (R. 96) which answer, considering what had preceded and what followed, would have been another attack on the jurisdiction of the Court. The next day, July 13th, the Court entered an order concerning the $20,000 remaining in the Fund after the distribution of the $48,580.40 provided for by the order of July 12, 1937. It again overruled petitioners' pleas or answers of lack of jurisdiction and directed them to answer to the merits within 20 days as to this $20,000. (R. 99-101.) They answered, but not to the merits. They claimed the Court had no jurisdiction to order them to answer to the merits. (R. 110-111.)

Petitioners claim (p. 27) that they suffered grievious injustice because the order of June 29th did not refer the matter to the Referee on the bank's answer and the bank had not been present at the hearing. The bank and all other

parties, except the petitioners, had already consented to the prayer of respondents' petition. (R. 74, 97.)

The reference to William L. Sullivan was not a reference to him as a Referee in Bankruptcy, but as a Special Master because there had been no adjudication of the alleged bankrupt. Therefore, Rule 14 of the Bankruptcy Act is not applicable. Equity Rule 66, if at all applicable, was in no way violated. Under the circumstances which existed when there was only one question before the Court, and that of law with no testimony or disputed facts, it was even superfluous for the Court to refer the cause to the Master or to give the respondents leave to file exceptions to the Master's Report. In any event, the Court was not bound to follow Equity Rule 66. The equity rules are to be looked to as analogies, but not as to rules binding on a bankruptcy court.

In re Kenney & Greenwood, 23 F. (2d) 681.
International Harvester Co. v. *Carlson*, 217 F. 736.

It is submitted that the District Court exercised its discretion wisely; that it treated petitioners with more patience and consideration than they deserved, and that it gave them ample time and full opportunity to present their claims and their rights.

Conclusion.

The petitioner, Benjamin F. J. Odell, is an attorney selected by the bankrupt to act for respondents without charge to respondents. He was not only the selection of the bankrupt, but was to be paid by the bankrupt. The petitioner, Roy G. Harris, is the President of the bankrupt. Together, the bankrupt, Odell and Harris devised the neat scheme of not merely making the $21,500 if they were successful in the Sales Tax litigation, but of also having re-

dents put a large sum of money in their custody and rol so that, if they were unsuccessful in the litigation, ondents would nevertheless be unable to obtain their ey unless they met petitioners' demands. When peti- ers were confronted by the possibility that their refusal rn over respondents' money to respondents might sub- them to a personal liability of $100,000, they consented he District Court's taking jurisdiction of the Escrow d and distributing it. Then, believing that they had ved themselves of the possibility of that personal lia- y, they attempted to retract their consent and claim the Court had no jurisdiction. They have no interest he Fund, certainly not that part of the Fund which the rt ordered them to turn over to respondents.

nder these circumstances and for the reasons above orth, it is respectfully submitted that the orders of the rict Court of July 12, and July 13, 1937, and the orders he United States Circuit Court of Appeals affirming costs said orders of the District Court, and ordering petitioners pay to respondents interest on $48,580.40 he rate of 5% per annum from July 12, 1937, until said 580.40 is paid, are correct, just and proper.

is further respectfully submitted that petitioners' peti- for certiorari has been filed merely for the purpose elay; that the questions on which the decision of this e depends are trivial and unsubstantial; that this Court ld, therefore, sustain respondents' motion to dismiss writ or affirm the orders of the District Court and the uit Court of Appeals, and should also enter an order ssing against petitioners damages in the sum of 10% 48,580.40, in accordance with Rule 30 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Stedman Co., et al., Respondents.

APPENDIX A.

In the District Court of the United States,

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Tax Service Association of Illinois, a corporation, Alleged Bankrupt. } In Bankruptcy No. 65890.

Order Approving Report of Special Master, Order of Adjudication in Bankruptcy, Etc.

This cause coming on to be heard upon the motion of the petitioning creditors for the approval of the report of Special Master William L. Sullivan, with reference to the involuntary petition in bankruptcy and the second amended answer filed thereto, and upon the exceptions of the alleged bankrupt heretofore filed to the said Special Master's report. • • •

And the Court having heard arguments of counsel and having considered the said Special Master's report, the exceptions of both the alleged bankrupt and the petitioning creditors filed thereto, the transcript of evidence, the pleadings, the abstracts and the briefs of the respective parties, and being fully advised in the premises, finds:

• • •

2. That this Court has jurisdiction of the subject matter hereof and of the parties hereto.

3. That on the day of the filing of the involuntary petition in this cause, and prior thereto, the alleged bankrupt was and is a moneyed business or commercial corporation

nable to an involuntary petition in bankruptcy within purview of the Bankruptcy Act.

* * *

. That an order should be entered forthwith adjudi-ng Tax Service Association of Illinois a bankrupt and rring this cause generally to a Referee in Bankruptcy;

* * *

is further ordered that Tax Service Association of Illi-, a corporation, be and it is hereby ordered adjudged a krupt and this case be and it is ordered referred gener-to the Honorable William L. Sullivan, Referee in Bank-cy, and that a rule be and the same is hereby entered the alleged bankrupt to file its schedules in this cause in Ten (10) days from and after the date hereof.

* * *

ENTER:

PHILIP L. SULLIVAN,
Judge.

o the entry of which order the alleged bankrupt ex-s.

TED STATES OF AMERICA,
THERN DISTRICT OF ILLINOIS. } ss.

HENRY W. FREEMAN, Clerk of the United States Dis-Court in and for the Northern District of Illinois, do by certify that the annexed and foregoing is a true and copy of the original Order entered April 27, 1938, In Matter of Tax Service Association of Illinois, a corpo-on, in bankruptcy No. 65890 now remaining among the rds of the said Court in my office.

further certify that to the date hereof no Appeal has taken from said Order.

TESTIMONY WHEREOF, I have hereunto subscribed my e and affixed the seal of the aforesaid Court at Chi-, Illinois, this 13th day of September, A. D. 1938.

HENRY W. FREEMAN,
Clerk.

L)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,

Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

SIGMUND W. DAVID,
Attorney for Respondents.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,

Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The record in this cause consists solely of pleadings and orders. There was no testimony taken and there are no disputed facts. All the record facts are contained in the sworn petitions filed by respondents, the answers thereto of parties other than the petitioners Odell and Harris, the Master's reports, and the District Court's orders. Petitioners Odell and Harris filed *no* pleadings averring any facts or denying any of the facts alleged by respondents.

Petitioners' claims of errors justifying reversal are thus predicated solely upon the face of the pleadings and the findings and orders entered thereon. The allegations of said pleadings and the findings not inconsistent therewith must, therefore, be taken as true.

Petitioners have no regard for the rule that decisions of this Court are based upon the record, and not upon unsworn and unsupported statements of the lawyer for petitioners, and that the only facts in this case are those contained in the record. They have omitted some of the most vital facts in the record, have misstated and misinterpreted others, have made many statements having no basis in the record, and others directly contrary to the record. It is, therefore, necessary to make a correct statement of the case. Such a statement follows.

Respondents, Dahl-Stedman Co., *et al.* (Avery Brundage Co. was originally made a party by inadvertence), (R. 70) are 277 building contractors, members of various building trade associations. (R. 18-22.) On April 9, 1935, their respective associations made a written agreement on their behalf with the Tax Service Association of Illinois, the bankrupt. In that agreement the bankrupt agreed to act for the members of the Associations, including respondents, to litigate the question whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to the said contractors. (R. 23.) For its services the bankrupt was to be paid $1,500 in advance and an additional specified sum, not to exceed $20,000, if the Supreme Court of Illinois decided that the contractors were exempt from the tax (R. 23.) The bankrupt agreed to retain the petitioner, Benj. F. J. Odell, as attorney for and on behalf of the contractors, but without expense to them. (R. 23.) The contractors agreed to follow such procedure as might from time to time be recommended by the bankrupt and Odell concerning filing of their monthly tax returns

and the escrowing of their taxes shown in such returns. (R. 23.) The agreement was signed on behalf of the bankrupt by the petitioner Harris, who was then Vice President and later became President of the bankrupt. (R. 24, 9.) Odell signed as follows: "I hereby consent to retention under the terms of this agreement." (R. 25.)

Respondents had no relations with Odell and Harris, except that Odell and Harris were acting for respondents under the terms of the agreement with the bankrupt. (R. 28, 30.) This agreement provided for the establishment of an Escrow Fund in order to carry out the purposes of the agreement. Pursuant to said agreement and the directions of the bankrupt, Harris and Odell, a so-called "escrow" was established at the National Builders Bank of Chicago, and respondents sent to the bankrupt their sales tax return, both originals and duplicate copies. (R. 26-28.)

Respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in said account for the purpose of having on hand and available sufficient moneys to pay the State of Illinois their respective taxes if it was decided that they were not exempt from said taxes. (R. 28.)

Pursuant to the directions of the bankrupt, Harris and Odell, respondents made their checks for the monthly taxes payable to the Sales Tax Escrow Fund at the National Builders Bank of Chicago, sent them to the bankrupt, and the bankrupt deposited the checks in that Fund. (R. 26, 28.) The Escrow Fund was established at the bank by a letter dated May 2, 1935, signed by Odell, Harris and Craig, Craig being Secretary of one of the contractors' associations. (R. 27, 28.) This letter reads (R. 27):

"National Builders Bank of Chicago.

GENTLEMEN:

"There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be de-

livered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.

You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the Sta of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each check must bear the signature of either: Benj. F. J. Odell, or Ruth V. Willner; and R. G. Harris or P. M. Weaver, together with E. M. Craig or R. D. Steel.

(Signed) BENJ. F. J. ODELL,
R. G. HARRIS,
E. M. CRAIG."

In acting as custodians of this Fund, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt. (R. 28.) The letter to the bank concerning the Escrow Fund expressly stated that Odell and Harris had no personal interest in the Fund but were mere custodians thereof. (R. 27.) Under the agreement of April 9, 1935, which expressly provided for the creation of the Escrow Fund, Odell and Harris were not to get any money, even if the litigation was successful, but the bankrupt was to get $20,000. (R. 23.) At the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Fund, although none of them were then acting for these respondents in any capacity. (R. 28, 30, 31-32.)

Pursuant to the agreement of April 9, 1935, the bankrupt kept books and records showing the amount that each respondent deposited each month in the Escrow Fund. (R. 29.) Some of the originals of the monthly tax returns sent by respondents to the bankrupt, pursuant to the agreement

of April 9, 1935, and the directions of the bankrupt, Odell and Harris, were filed with the Illinois Department of Finance. Others of said originals and all of the duplicates were kept by the bankrupt. (R. 26-27.)

Pursuant to the agreement of April 9, 1935, the bankrupt and Odell, on September 4, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, in which these respondents and some other contractors were the plaintiffs. (R. 29.) The suit was for an injunction to restrain the assessment and collection of the sales tax against the plaintiffs, upon the ground that the plaintiffs were exempt from the payment of said tax. (R. 29.) The bill was dismissed and an appeal was taken to the Supreme Court of Illinois. (R. 29.) In February, 1937, the Illinois Supreme Court decided, *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, against the plaintiffs, holding squarely that the contractors were not exempt from the sales tax. On April 2, 1937, pursuant to the mandate of the Illinois Supreme Court, a decree was entered in the Circuit Court giving the contractors until June 1st to pay their taxes, with interest at 3 per cent, and providing that, if they failed to file their returns and pay their taxes by June 1st, they would be subject to the penalty of 25 per cent plus interest at 5 per cent provided in the Sales Tax Act. (R. 29-30.)

On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a Receiver. (R. 2.) On May 24, 1937, respondents filed their sworn petition. (R. 18.) At that time respondents had over $297,000 of their money in the Escrow Fund and the bankrupt, acting through its agents Odell and Harris, had custody and control of the Escrow Fund and, therefore, of respondents' money. (R. 28, 32.) Craig was willing and desired to release to respondents the money belonging to them in the Escrow Fund. (R. 33.) The bankrupt, Odell and Harris were not, and had refused to re-

lease any of it. (R. 32-33.) Many of the original tax returns of respondents and all of their duplicate tax returns, which belonged to them and which they needed in order to determine the amount of their taxes, how much they had in the Escrow Fund and how much was due to the State, etc., were in the possession of the bankrupt and its agents Odell and Harris (R. 33-34), who had refused to turn them over to respondents or to the Receiver of the bankrupt. (R. 32-33.) The books and records of the bankrupt showing the amount that each respondent had deposited each month in the Escrow Fund were in the possession of the bankrupt and its agents Odell and Harris, and they had refused to turn them over either to the respondents or to the Receiver. (R. 33.)

Respondents' petition filed May 24, 1937, averred all of the foregoing facts and prayed that respondents' money in the Escrow Fund, which was in the custody and control of the bankrupt and its agents Odell and Harris, be turned over to respondents; that respondents' original tax returns which had not been filed, and all of respondents' duplicate tax returns, which they had delivered to the bankrupt and which were in the possession of the bankrupt and its agents Odell and Harris, be turned over to respondents; and that the books and records of the bankrupt showing the amount each respondent had deposited in the Escrow Fund, which were in the possession of the bankrupt and its agents Odell and Harris, be delivered to the Receiver and made available for inspection by respondents. (R. 18-38.)

Due notice of the presentation of this petition was given to the Receiver of the bankrupt, the bankrupt, Harris, Odell, Craig and the National Builders Bank of Chicago. *Without objection from any of them*, the District Court entered an order on May 24th giving leave to respondents to file their petition, making the above named parties respondents to the petition, and ordering them to file their an-

swers to the petition by May 27, 1937, and that the matter be set for hearing upon the petition and answers on May 27, 1937. (R. 17, 18.)

Upon agreement and approval in writing by respondents, the petitioning creditors, the Receivers, the bankrupt, the National Builders Bank, Odell, Harris and Craig, the District Court entered its order of May 27, 1937. (R. 39-41.) The order states that all parties had agreed in open court that the court had jurisdiction to enter the order. (R. 39.) In the order it was agreed that there was $314,885.95 in the Sales Tax Escrow Fund, as alleged in the petition of these respondents; (R. 39) that the greater portion of it represented the proceeds of checks deposited in the Fund by respondents, and the balance of it represented the proceeds of checks deposited by other contractors represented by Odell; (R. 39) and that Odell agreed to the order not merely for himself, as respondent to said petition, but also on behalf of the contractors represented by him. (R. 40.) It was ordered by the District Court that out of the Sales Tax Escrow Fund there be paid *instanter* to the Department of Finance of the State of Illinois 75 per cent of the proceeds of checks of each of the respondents herein and each other contractor deposited in said Fund, plus interest thereon, said 75 per cent plus interest amounting to $242,200; that Odell, Harris and Craig sign *instanter* a joint check for $242,200 payable to the Department of Finance, and that the National Builders Bank of Chicago honor and pay said check out of the Sales Tax Escrow Fund; that within 5 days these respondents furnish to the petitioners herein an itemized statement showing the amount that each of these respondents claimed to have deposited in said Fund; that said list and the amounts thereof be checked and examined by Odell; that he report the result thereof to the attorney for these respondents, and that, if there be any differences in the fig-

ures furnished by these respondents and the figures in the hands of said Odell, said differences be determined by the court; *"that the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank amounting to* $72,685.96 *shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court . . .; that all claims and rights in and to said balance of* $72,685.96 *in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan upon petition of petitioners and the answers and other pleadings filed and hereafter filed thereof."* (R. 39-41.)

The bank's answer to the petition, filed May 27th, admitted the amount in the Sales Tax Escrow Fund and "disclaimed all interest in the other allegations in the petition." (R. 46.) Craig answered that he was ready, willing and eager to comply with any request of these respondents in regard to the disposition of the moneys deposited by them in the bank and to release or disburse said moneys in said Fund in accordance with these respondents' desire. (R. 47.) The Receiver of the bankrupt answered on June 3rd that he had in his possession none of the documents referred to in the petition; that the checks of these respondents deposited in the Escrow Fund were deposited not only for the purpose of having on hand and available sufficient moneys to pay the taxes on respondents' returns, if it was decided that these respondents were not exempt from said tax, but also for the purpose of assuring payment to the bankrupt of such amount as might be due it under the agreement of April 9, 1935, in the event of a favorable decision; that the portion of the Sales Tax Escrow Fund on deposit with the bank which was furnished by these respondents was subject to the jurisdiction and order of the court; (R. 50) that he, as Receiver of the bankrupt, was entitled to the possession of all the originals and duplicate

returns of these respondents in the possession of the bankrupt and Odell and Harris, and all the books, records and accounts of the bankrupt showing how much was deposited in the Escrow Fund by these respondents, which were in the possession of the bankrupt, Odell and Harris, and that they had not been turned over to him; and that he as Receiver had an interest in the moneys deposited in the Sales Tax Escrow Fund in an amount not to exceed $20,000. (R. 51, 52.)

At the time the agreed order of May 27, 1937, was entered, there was a motion of the bankrupt pending to quash the service of process upon the bankrupt, alleging lack of jurisdiction of the court over the bankrupt because of alleged defective service. (R. 6.) Odell, Harris and the bankrupt filed pleas to respondents' petition of May 24, 1937, on June 3, 1937. These pleas alleged that the District Court was without jurisdiction to determine any rights relating to the petition of these respondents while the question of the court's "bankruptcy jurisdiction" over the bankrupt was pending undetermined because of the pendency of the bankrupt's motion to quash the service upon it. (R. 54-56.) On June 29th the District Court denied the bankrupt's motion to quash the service of process, struck its special appearance, and ordered and decreed that the bankrupt had appeared in the cause generally and that the court had jurisdiction to determine the merits of the cause, (R. 75-76) and ordered the bankrupt to file its answer on the merits, which the bankrupt did on July 2nd. (R. 77.)

After this order of June 29th was entered, these respondents filed their petition of June 29, 1937. On that day the remaining balance in the Sales Tax Escrow Fund was in the custody and under the control of the District Court, as it had been in the possession and control of the bankrupt and its agents when the bankruptcy petition was filed, and

the Court's *custodia legis* had been acknowledged and confirmed by all parties in the agreed and approved order of May 27, 1937. (R. 41.) By the terms of the letter of April 2, 1935, relating to the Escrow, there was required for withdrawal of the Fund from the bank the joint signatures of Craig and the bankrupt's agents Odell and Harris. Craig had put himself on record that he had no interest in the Fund and was willing to turn it over to these respondents. (R. 47.) Odell and Harris had no interest personally in the Fund. (R. 27; 39-40.) Over $68,580 of the $72,758 in the fund belonged to these respondents. (R. 70, 71, 97.) This had been ascertained by checking and verifying, pursuant to paragraph 3 of the agreed order of May 27, 1937, (R. 40) the amount each of these respondents had deposited in the Fund. (R. 70, 71.) The Receiver of the bankrupt claimed that by reason of the agreement of April 9, 1935, he was entitled to $20,000 of this Fund. $48,580.40 of the Fund belonged to these respondents, free of any claim of anyone. These respondents' petition set forth all of the above facts, (R. 69-72) and asked that this $48,580.40 be turned over to them, leaving $20,000 of their money in the Fund so that any claims of anybody arising out of the agreement of April 9, 1935, might be reserved and later adjudicated. (R. 71-72.)

No one objected to the petition or to these respondents getting this $48,580.40 except the bankrupt (which did not stand on its objections) and Odell and Harris. (R. 74, 97.) The court directed Odell and Harris to answer the petition, and each of them stated that they did not desire to answer it. (R. 74.) The motion of the bankrupt to quash service upon it had been overruled and the court had taken jurisdiction of the bankruptcy petition on the merits. Odell's special answer and Harris' motion to strike these respondents' petition of May 24, 1937, were based solely upon the pendency of the bankrupt's motion to quash service. In

spite of this, Odell requested that his special answer to these respondents' petition of May 24th, and Harris requested that his motion to strike said petition af May 24th, stand as their respective answers to these respondents' petition of June 29th. (R. 74.) There was thus no question of jurisdiction before the court presented by Odell's and Harris' answers to these respondents' petition of June 29th. The court expressly invited Odell and Harris to answer this petition on the merits, but they insisted that they wanted to stand on their special answers of alleged lack of jurisdiction. Since, under these circumstances, there was no question presented to the court or, at the most, merely a question of law, the District Court could and should have acted on these respondents' petition *instanter*. However, it referred the matter to a Referee, acting as a Special Master. (R. 73-75.)

The Referee filed his report on July 7th. (R. 78-88.) Odell and Harris asked and obtained leave to file their exceptions to the report, and filed the same. (R. 92.) After consideration of the exceptions, the District Court entered its order of July 12, 1937, which is one of the orders appealed from. (R. 96-99.) In this order the Court found that the allegations of these respondents' petition of June 29th were true; that the Court had jurisdiction over the Escrow Fund and of the parties thereto, including Odell, Harris, Craig, the bankrupt and the bank; that there was $68,580.40 in the Escrow Fund which was the proceeds of checks of these respondents deposited in the Fund, and that of said $68,580.40, $48,580.40 was the money of and belonged to these respondents, free from any claim or demand of any kind whatsoever of any of the parties including the bankrupt, the Receiver, Odell, Harris, Craig and the National Builders Bank; and that George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, were authorized to re-

ceive on behalf of these respondents the money belonging to respondents in the Fund. The court thereupon ordered that the exceptions of Odell and Harris be overruled and that Odell, Harris and Craig sign a joint check on the Fund for $48,580.40 and deliver it to these respondents, and that after the payment of said check the balance remaining in said Fund amounting to $24,178.35, should remain and be held in the Fund subject to the further order of the Court. (R. 96-99.) Odell's and Harris' motion to file a second supplemental answer was denied. (R. 96.)

On July 13th, on motion of these respondents, the Court ordered Odell and Harris and the bankrupt to answer to the merits concerning the $20,000, which these respondents and the Receiver of the bankrupt both claimed and which was the limit of any claim, no matter how unfounded or chimerical, which Odell and Harris might have against the Escrow Fund, and which $20,000 had been left subject to the further order of the court. (R. 99-100.) Given the opportunity to answer to the merits concerning, or state the basis of any claim they might have to the $20,000, Odell and Harris refused to do so and filed a "special answer," merely reasserting that the court had no jurisdiction over the Fund. (R. 110.) Odell and Harris appealed from this order of July 13th as well as that of July 12th.

The Circuit Court of Appeals affirmed with costs the orders appealed from, (R. 134) denied petitioners' petition for rehearing, and ordered that petitioners pay to respondents interest on $48,580.40 at the rate of 5 per cent per annum from July 12, 1937, until said $48,580.40 is paid. (R. 197.)

The above statement of facts is accurate and presents fairly all the record facts, as a reading of the record will prove. It is, therefore, not our intention to direct attention in detail to all of the misstatements and omissions of

record facts and the deliberate attempt to confuse this Court contained in the brief for petitioners. It is difficult for a litigant to reply to a statement of fact by his opponent which is unsupported by the record and is untrue or totally unwarranted, by simply pointing out that such statement has no support in the record. But, as we regard this as the only proper method of reply in this Court, we shall endeavor to adhere to it. Some few of the statements in petitioners' brief deserve special attention. For instance:

Petitioners relate (their brief, pp. 2-3) how the Escrow Fund arose. They state that the contractors sought Odell's services and requested him to represent them; that he expressed his willingness to represent them, but on condition that he would be relieved of the heavy burden of clerical details, etc.; that thereupon the trade associations procured the bankrupt, of which some of the associations and individual contractors were members, to handle these details, and entered into a written agreement to pay the association $1,500 for clerical services and designating the manner in which the payment of Odell's fee should be apportioned; that the trade associations notified Odell of this arrangement, and later the individual contractors engaged Odell by individual contracts; that, by reason of said contracts, Odell is entitled to a lien on the Escrow Fund (Petitioners' Brief, p. 52) and to support this they annex an Appendix (p. 63) purporting to exhibit such a contract.

The history of the establishment of the Escrow Fund and Odell's relationship thereto is important because it pertains to the question of jurisdiction raised by petitioners. Yet, not one of the above statements made by petitioners is true or has any support in the record. The only facts in relation to the establishment of the Escrow Fund and Odell's connection therewith are contained in respondents' sworn petition of May 24, 1937 (R. 18-37), their petition of June 29, 1937 (R. 69-73), the answers of the bank, Craig

and the Receiver of the bankrupt (R. 46, 47, 48), the Referee's report (R. 78-88) and the Court's orders (R. 39-41; 96-99; 99-101). The record facts contained in these pleadings and orders expressly refute petitioners' statements.

The contract said nothing about the contractors paying Odell a fee. On the contrary, it expressly and explicitly stated that any fee charge or expense to be paid by the contractors was to be paid to the bankrupt, not Odell; that the contractors employed the bankrupt and the bankrupt agreed to retain for the contractors, but without expense to them, Attorney Odell. (R. 23-25.) The *only* separate agreement between any of the contractors and Odell was one some contractors executed, merely giving Odell authority to act as their attorney for the purposes set forth in the agreement of April 9, 1935. (R. 25.) No contract such as Appendix A and no claim of lien by Odell appear in the record.

Petitioners assert (Petitioners' Brief, pp. 4, 52) that the Supreme Court of Illinois decided *partially in favor of* the contractors in the case of *Blome Co.* v. *Ames*, 365 Ill. 456 (their petition for certiorari, p. 3, omitted the word "partially"); that thereupon the Illinois Department of Finance was compelled to change its rulings, and subsequently the Illinois Supreme Court in *Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600, voluntarily modified its decision and held that the contractors were completely exempt from the Sales Tax and, thus, as a result of the efforts of Odell the contractors are now exempt from the Sales Tax. The facts are that the contractors' suit was decided *against* the contractors. (R. 29-30.) The case of *Blome Co.* v. *Ames*, 365 Ill. 456, held that the contractors were not exempt from the tax. A reading of the opinion in that case is all that is necessary to determine that fact. After a final decree was entered in the *Blome* case, the contractors, with the consent and approval of Odell, paid to the State on account

$242,200 of the taxes from which petitioners now assert Odell was successful in having the contractors held exempt. (R. 39, 69-71.) In December, 1937, six months after the orders here appealed from were entered by the District Court, the Illinois Supreme Court rendered its decision in the case of *Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600. The *Herlihy* case had no connection with the *Blome* case, none of these respondents were parties to the *Herlihy* case, and Mr. Odell had no connection therewith, either as party or attorney.

Petitioners' brief (p. 4) would make it appear to this Court that their statement that the Illinois Department of Finance was compelled to change its ruling in conformity with the decision in the *Blome* case is supported by the record. The record they refer to is their petition for rehearing in the Court of Appeals.

Petitioners say (their brief, p. 6) with reference to the payment of 75% of the money in the Escrow:

> "The 75% was a compromise figure (representing a tax on material only) made with the State of Illinois for the said contractors."

This statement is directly contrary to the record. The payment of 75% was a payment on account. (R. 40.)

Petitioners reiterate (Brief, pp. 7, 50) that the order of June 29, 1937, which found that the petitioners did not desire to answer these respondents' petition, etc. was a purported order obtained under most unusual circumstances by the attorney for these respondents, and was false. This assertion is utterly baseless and untrue in its entirety and has no support whatsoever in the record. It may be noted that petitioners made no attempt at any time to correct this alleged false and fraudulent order; they did file exceptions to the Master's report, in which they made a similar assertion about the order, and these exceptions the District Court overruled. (R. 92, 96.) This brazen and base-

less charge against counsel for respondents comes with total disregard of the proprieties due this Court and an attorney privileged to practice before it, and it comes from a lawyer whose unethical conduct has recently been severely censured.

See:

Odell v. *Bausch & Lomb Optical Co., et al.*, (C. C. A. 7th Cir.), 91 F. (2d) 359; certiorari denied 302 U. S. 756, 780; 82 L. Ed. 232, 347.

Petitioners state (Brief, pp. 36, 38) that the order of May 27th was entered at the solicitation and suggestion of the District Court and that it was agreed in open Court that the consent to the distribution would not jeopardize petitioners' rights to have determined the question of the jurisdiction of the Court over the 25% balance of the Escrow Fund. This is untrue and in direct contradiction to the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement. On the contrary, the order itself, which was agreed to and approved by the petitioners in writing, expressly provided that the Court take jurisdiction and determine the distribution of the balance of the Fund. (R. 41.)

Petitioners now claim (Brief, pp. 35-36), incidentally for the first time,—that the agreed order of May 27th was entered under the "worst type of coercion and compulsion to which conscientious parties, subject to a sacred trust, can be subjected." To support their claim they say that, immediately upon the filing of these respondents' petition, petitioners took the position that the Court was utterly without jurisdiction to entertain the same. The record shows the contrary:—petitioners made no objection to the filing of the petition and to making them respondents thereto (R. 17-18); they agreed that the Court had juris-

diction to entertain the same, and asked the Court to proceed accordingly. (R. 39-41.) Petitioners say that the attorney for these respondents insisted upon an agreed order and the Court refused to authorize the disbursement except upon such agreed order. Nothing in the record sustains this assertion. Petitioners say further that the attorney for respondents, knowing the necessity for immediate disbursement, deliberately tied up the funds to prevent disbursement except upon his own terms. Nothing in the record supports this statement, and the record proves just the contrary. It proves that petitioners Odell and Harris had absolutely refused to turn over to these respondents any of respondents' tax returns or other data, or any of their money in the Fund (R. 31-33), and that it was necessary (unless these respondents were willing to pay to Odell and Harris a very substantial sum of money, for which payment there would have been no justification except to avoid vexatious litigation) that the bankrupt and its agents Odell and Harris be compelled by order of Court to turn over the money so respondents could pay their taxes.

Petitioners also say (p. 36) that the Judge was imposed upon by counsel for respondents in the pursuance of his devious plans, and as a result of his mistake allowed the petition of May 24th to be filed. The petition was filed without objection from Odell and Harris, or anyone else. (R. 17-18.) The order of May 27th was entered not only without objection from Odell and Harris or anyone else, but with their consent. (R. 39-41.) The District Court also entered the orders of July 12th and 13th and the Court of Appeals affirmed them.

Petitioners state (Brief, p. 6) that on June 29, 1937, respondents abandoned their petition of May 24th. The record shows the contrary; respondents' petition of June

29th was based upon and is supplementary to their petition of May 24th. (R. 69-72, 99, 100.)

Petitioners insist that the bankrupt was not a moneyed business or commercial corporation and, therefore, the Court had no jurisdiction over it. (Brief, p. 56.) The Special Master reported to the Court that:

> "Certainly there was nothing eleemosynary in and about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter"; (R. 178.)

On April 27, 1938, the District Court approved the Master's report, specifically found that the alleged bankrupt was and is a moneyed business or commercial corporation amenable to an involuntary petition in bankruptcy, and adjudicated it a bankrupt; and no appeal or review of said order has been sought. (Appendix A, *infra*, p. 71.)

SUMMARY OF ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

A. A bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

B. This property includes not only property which is owned by the bankrupt, but also all property which at the time of the filing of the petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or the bankrupt's agent.

C. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, was in the legal possession and actual control and custody of the bankrupt and its agents Odell and Harris; and part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt. This case, therefore, is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate, and in which the bankrupt has no interest. No real, but only a pretended, question of jurisdiction exists in this case.

D. With the consent of petitioners and all other parties, the Escrow Fund came into *custodia legis* of the District Court, and with the consent of petitioners and all other parties the greater part of the Escrow Fund was distributed and the balance was left subject to the further order of the Court. Afterwards, petitioners filed special motions or

answers of lack of jurisdiction of the Court predicated on the pendency of the bankrupt's motion to quash service upon it. When that motion to quash was denied on June 29th, no question of the jurisdiction of the Court over the parties or the balance of the Escrow Fund remained. The order of July 12, 1937, merely distributed part of the balance of the Fund, and the order of July 13, 1937, merely ordered petitioners to plead any interest they might have in the $20,000 remaining in the Fund.

E. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. At no time did petitioners present to the District Court any facts tending to show that they were not agents of the bankrupt in control and custody of the Escrow Fund, and at no time did they even make an assertion of an adverse claim.

F. A bankruptcy court has jurisdiction, before adjudication of the bankrupt, over controversies relating to the property of a bankrupt or property in the possession of a bankrupt.

G. The undisputed facts in the record refute petitioners' claim that this was a controversy between strangers to the proceedings and that Odell and Harris were not the agents of the bankrupt.

H. An undisputed bank balance under the control or custody of the bankrupt or its agents is in the constructive possession of the bankruptcy court and subject to its jurisdiction.

I. The District Court not only had jurisdiction, but it was the only court which had jurisdiction and to which respondents could have resorted.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

A. Odell and Harris expressly agreed that the District Court had the right and authority to determine rights in and claims to the Escrow Funds and to distribute it (which is all the orders appealed from attempt to do or do). They complied with the order of the Court, distributing over 75% of the Fund. They turned over the custody and control of the balance of the Fund from themselves, as agents of the bankrupt, to the Court.

Having done these things, they are estopped from claiming that the Court had no "jurisdiction" to distribute to respondents that part of the balance of the Fund which belonged to respondents and to which no other person had any claim.

B. Petitioners cannot, in June, 1937, object to the jurisdiction of the Court when in May, 1937, they expressly agreed that the Court had that identical jurisdiction and joined in inducing the Court to enter its order, which it could not have entered unless it had jurisdiction. But, even if the Court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction, such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

C. The claim of petitioners that they did not consent to what the order of May 27th actually says and that, if they did so, their consent was obtained by duress is frivolous and refuted by the record.

III.

Petitioners Odell and Harris Are at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Have Been Ordered to Distribute to Its Owners, and Have No Other Interest Therein and, Therefore, Have No Appealable Interest.

A. The fact that Odell and Harris have no interest in the Fund except as custodians or stakeholders is shown by the record.

B. At no time in the District Court did petitioners show or attempt to show, or even claim, that they had an interest in the Escrow Fund other than as custodians or stakeholders. Their present assertions that they have such interest were not made in the District Court, and are predicated upon their unsupported statements in their brief with no basis therefor in the record.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

Irrespective of the consent of the petitioners to jurisdiction, or the estoppel against them to deny it, the District Court had jurisdiction to enter the orders of May 27, July 12, and July 13, 1937. In essence, this was a simple reclamation suit. These respondents claimed to be the owners of property (their Sales Tax returns and their money in an Escrow Fund) they desired to reclaim. Their property was in the custody and control of the bankrupt and its agents, Odell and Harris. (R. 18-37.) The Receiver of the bankrupt claimed that part of the property (*i. e.*, the Sales Tax returns and part of the Fund) belonged to the bankrupt and that all the property was under the jurisdiction of the Court. (R. 48-53.) The bankrupt and its agents Odell and Harris had refused to turn respondents' property over to respondents or to the Receiver. (R. 31-34.)

It is impossible to discuss or reply to all of petitioners' arguments and suggestions within the confines of a brief of reasonable length. It is also unnecessary to do so, for the facts in this case are simple and the rules of law applicable thereto are clear.

A. A bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

The Bankruptcy Act, Sec. 2 (6, 7) authorizes the bankruptcy court to

> "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary

for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

11 U. S. C. A. Par. 11 (6, 7.)

By reason of this provision, all property in the possession, custody or control of a bankrupt or its agent at the time the petition for bankruptcy is filed is in *custodia legis* of the bankruptcy court, and the court has jurisdiction to determine all controversies relating thereto. Physical possession of the property by the bankrupt is not necessary. Constructive possession, custody or control by the bankrupt or its agent makes the property subject to the jurisdiction of the court and gives that court exclusive jurisdiction to determine to whom the property belongs, or what liens or claims there may be against it, and all controversies relating thereto. The property drawn within the control of the court need not be owned by the bankrupt. It may actually belong to others, and the bankrupt or its agent may be holding it as bailee, trustee, agent or otherwise.

The principle of law that the bankruptcy court has jurisdiction of property which is in the possession, control or custody of the bankrupt or its agent at the time of the filing of the petition in bankruptcy is settled by this Court. The rule is well stated in

Page v. *Arkansas Natural Gas Corporation,* (C. C. A., 8th Cir.), 53 F. (2d) 27; affirmed 286 U. S. 269; 76 L. Ed. 1096.

The facts in that case are somewhat involved, but those pertinent to that part of the court's opinion relevant here are as follows: A petition in bankruptcy was filed against an oil syndicate. A trustee in bankruptcy was appointed and he put up placards on the property covered by a cer-

tain Bilyou lease, stating that it was in his possession as Receiver of the Federal Court, and he paid the annual rental due on the lease. One L filed an intervention claiming the lease belonged to him. The trustee filed an answer denying ownership in L and asking for a summary order directing L to execute a quit-claim deed to the trustee in bankruptcy. L had been trustee of the trust syndicate, and the lease was in L's name. The court held that L had no interest in the lease and ordered him to convey it to the bankruptcy trustee, which L did. Later it was sold by the bankruptcy trustee and subsequently certain parties claimed that the corporation to which the trustee in bankruptcy had sold the lease had no title, as the bankruptcy court had no jurisdiction to order L to make a deed to the bankruptcy trustee of the lease and, therefore, the trustee did not get good title to the lease and could not convey good title. The Court said, in part, p. 33:

> "5 Remington on Bankruptcy (3d Ed.), § 2365, p. 448, says: 'So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or *by the bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property', and the property comes into its '*custodia legis*', if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy or of the trustee, marshal, referee, *bankrupt, bankrupt's agent*, or of someone not claiming beneficial interest'." * * * (Italics ours.)

One of the most thorough discussions of this rule is contained in the case of

> *Gamble* v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied, 282 U. S. 848, 75 L. Ed. 752,

citing many cases decided by this Court. The Gamble case

decided that the jurisdiction of a bankruptcy court over property is determined by the fact that the property is in the possession of the bankrupt or its agent at the time the petition in bankruptcy is filed; that such possession need not be actual, but may be constructive; that such constructive possession exists in many instances, such as when the property is in the control or the custody of the bankrupt's agent, or of one who makes a claim to the property which claim is colorable only, or where it is held by someone for the account of the bankrupt, etc., and that when the Court has jurisdiction over such property it has the jurisdiction by summary proceedings to adjudicate the rights of various parties in and all claims to said property.

In

May v. *Henderson*, 268 U. S. 108, 68 L. Ed. 870, the question was as to the jurisdiction of the court over money in a bank held by assignees before bankruptcy of the bankrupt who had deposited it in the bank as trustees for creditors. The court said, in part, L. Ed., p. 873:

> "Property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court." * * * "Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated." (Citing cases.) "It may disregard the assertion that the claim is adverse if, on the undisputed facts, it appears to be merely colorable." * * *
>
> "The several amounts" * * * "fall clearly within the rule that, as to property in the hands of the bankrupt, or held by others for his account, 'the filing of the petition is a caveat to all the world, and in fact an attachment and an injunction.'"

To the same effect are numerous cases and authorities, including:

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, Sec. 2365, pp. 542-555.

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent*, 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402, 406.

Commercial Credit Co. v. *Street*, (C. C. A. 9th Cir.) 65 F. (2d) 102.

Chandler v. *Perry*, (C. C. A. 5th Cir.), 74 F. (2d) 371.

Central Republic Bank & Trust Co. v. *Caldwell*, (C. C. A. 8th Cir.) 58 F. (2d) 721.

Denton v. *Gurnett*, (C. C. A. 8th Cir.) 69 F. (2d) 750.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116.

In re Kerr, 5 F. Supp. 898.

B. This property includes not only property which is owned by the bankrupt, but also all property which at the time of the filing of the petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or the bankrupt's agent.

Petitioners' claim seems to be that a bankruptcy court has jurisdiction only over property which is owned by the bankrupt. This position is refuted by the cases. The bankruptcy court has jurisdiction not only of property which is owned by the bankrupt, but also of all property which at the time of the filing of a petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or its agent. If a bankruptcy court has jurisdiction only over the bankrupt's own prop-

erty, then it would have no jurisdiction over reclamatio proceedings. As was said by the court in

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d 447; certiorari denied 282 U. S. 848.

p. 454:

"Great emphasis is placed by counsel upon the ar gument that the property in question is purely that a to which the bankrupt's possession was only that o trustee, etc.; that the bankruptcy court has no juris diction to administer such property, and that the ap pellant has. Administration of property by a bank ruptcy court involves several elements. One of thes is collection of the property of the bankrupt. In tha sense, the bankruptcy court has jurisdiction (as abov shown) to administer on all property in actual or con structive possession of the bankrupt at the time th petition is filed. Such jurisdiction is the power to de termine what title or right or interest the bankrup may have therein and to make orders in pursuance o such determination. *This exists irrespective of th character of title, right, or interest claimed therein b others, and has often been exercised where the clai was that the bankrupt held as trustee.* A few of such cases are *Equitable Trust Co. of N. Y., Trustee*, v *First Nat. Bank*, 275 U. S. 359, 48 S. Ct. 167, 72 L. Ed 313; *Cunningham, Trustee*, v. *Brown*, 265 U. S. 1, 11, 44 S. Ct. 424, 68 L. Ed. 873; *Schuyler* v. *Littlefield*, 23 U. S. 707, 34 S. Ct. 466, 58 L. Ed. 806; and the follow ing in this court: *In re Horigan Supply Co.*, 2 F. (2d) 791; *In re Blue Bird Appliance Co.*, 292 F. 127; *Cen tral State Bank* v. *McFarlin*, 257 F. 535; *Macy* v. *Roe denbeck*, 227 F. 346, L. R. A. 1916C, 12. The matter involved in this order is not whether specific property is trust property and should be turned over by the bankruptcy court to some one, but it is the matter of jurisdiction—determination of what court shall deter mine what property shall be turned over, to whom it shall be turned over, and under what, if any, condi tions it shall be turned over." (Italics ours.)

In

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, it is said, p. 554:

"Possession by the bankrupt may give jurisdiction

> to the bankruptcy court even if the possession is not exclusive, and regardless of the capacity in which he holds, whether in his own right or as agent for another."

And on p. 584:

> "No matter in what capacity the bankrupt may be holding, if he has actual possession, custody or control, it is the bankruptcy court to which resort must be had."

That rule is applied in many cases where the bankrupt or its agent was in possession of the property as bailee, pledgee or trustee, such as, for instance, cases of a stock broker where the customer has paid for the stock and the broker holds the stock merely as bailee. If the broker becomes a bankrupt, the customer must reclaim his stock in the court of bankruptcy. See

Denton v. *Gurnett*, (C. C. A. 8th Cir.) 69 F. (2d) 750,

where stock was reclaimed in the bankruptcy court although the bankrupt had no actual interest in the stock and even though, at the time the petition was filed, the stock was not in possession of the bankrupt but was pledged by it.

C. and D. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, was in the legal possession and actual control and custody of the bankrupt and its agents Odell and Harris; and part of the Fund was claimed by respondents to be their property and part of it the receiver of the bankrupt claimed belonged to the bankrupt. This case, therefore, is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate, in which the bankrupt has no interest. No real, but only a pretended, question of jurisdiction exists in this case.

In the instant case, not only were the entire Escrow Fund and the Sales Tax returns of respondents in the possession, control and custody of the bankrupt and its agents Odell and Harris, but the bankrupt, through its Receiver, claimed that $20,000 of the Escrow Fund was the property of the bankrupt and possession of the returns belonged to the Receiver. Petitioners raise only a pretended, not a real, question of jurisdiction. Their claim of no jurisdiction ignores the record facts and is based upon the theory that neither Odell nor Harris were agents of the bankrupt and that the bankrupt had nothing to do with the Escrow Fund. The record facts are to the contrary. A reading of respondents' petition, (R. 18-38) particularly the contract between the bankrupt and respondents (R. 22-25) and the letter establishing the Escrow Fund (R. 27-28) will suffice to prove that the Escrow Fund, immediately upon the filing of the petition in bankruptcy, was in *custodia legis* of the Court because it was then in the custody and control of the bankrupt and its agents. The Escrow Fund was part and parcel of the entire plan agreed upon in the contract of April 9, 1935, in which the bankrupt was one party, these

respondents the other and Odell was the agent selected by the bankrupt for the purpose of enabling the bankrupt to make $20,000. (R. 23-26.) The Escrow Fund was established pursuant to the agreement between these respondents and the bankrupt; respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in it pursuant to the suggestion and request of the bankrupt and Harris and Odell. Odell's and Harris' relations and connection with these respondents were created and limited solely by the agreement of April 9, 1935, and the approval of Odell's engagement as attorney executed by some of the respondents pursuant thereto. (R. 25, 28.)

Throughout their brief, petitioners ignore the fact that the petition filed by these respondents on May 24th alleged that Odell and Harris were the agents of the bankrupt and that the Escrow Fund and the books and records of these respondents were in the possession, control and custody of the bankrupt and its agents Odell and Harris; (R. 18-38) that all of the facts in relation to the Escrow Fund set up in these respondents' petition showed that in the custody and control of the Fund Odell and Harris were acting merely as the agents of the bankrupt; that these allegations and these facts were never at any time denied by the petitioners Odell and Harris or by any other party to the proceedings; that the petitioners' so-called pleas to the jurisdiction alleged no facts; that the Court, in passing upon the so-called pleas of jurisdiction, necessarily considered the facts alleged in these respondents' petition to be true; and that when the issues made by petitioners' so-called pleas of jurisdiction to these respondents' petition of June 29, 1937 (upon which the appealed order of July 12th was entered) were referred to the Referee, petitioners, although full opportunity was given them, offered no evidence in support of their pleas. (R. 73-75, 85, 87, 96-99.)

Not only did the petitioners fail to deny the allegations of respondents' petition, but they conceded the truth of these jurisdictional facts by their consent to both the findings of fact and the decretal part of the District Court's order of May 27, 1937. (R. 39-41.)

An additional fact which petitioners ignore is significant. They did not appeal from the consent order of May 27, 1937. They appealed from the orders of July 12, and July 13, 1937. At the time the orders appealed from were entered, the Receiver of the bankrupt claimed that the entire Escrow Fund, respondents' duplicate tax returns and the books of the bankrupt showing the amounts deposited in the Escrow Fund were under the jurisdiction of the bankruptcy court, and that the bankrupt was entitled to a share of the Fund and to the books and records of the bankrupt and the tax returns of these respondents; (R. 48-53) and the bankruptcy court had, with the consent and approval of the petitioners and of all other parties, taken actual control of the Escrow Fund, the books and records of the bankrupt, the tax returns of these respondents, and the disposition of said properties. (R. 39-41.)

II. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. At no time did petitioners present to the District Court any facts tending to show that they were not agents of the bankrupt in control and custody of the Escrow Fund, and at no time did they even make an assertion of an adverse claim.

Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. Even a third party or an adverse claimant may be ordered by a bankruptcy court to

turn over property on a summary proceeding when he has done nothing more than to question jurisdiction.

In

Mueller v. *Nugent*, 184 U. S. 1; 46 L. Ed. 405,

this court said, L. Ed. p. 411:

> "Does a mere refusal by a bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be?
>
> "If it be so, the grounds of jurisdiction to cause the estate of bankrupts to be collected and to determine controversies relating thereto would be seriously impaired, and in many respects rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceed in chancery, at the risk of the accompaniments of delay, complication and expense, intended to be avoided by the simpler methods of the bankrupt law." * * *
>
> "But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction."

In

In re Wein, 13 F. (2d) 426,

the trustee of the bankrupt filed a petition against third parties alleging that they were withholding property of the bankrupt and that they be ordered to turn it over. The respondents objected to the jurisdiction. The objection was overruled and a turn-over order was entered. The court said, p. 427:

> "They (respondents) now claim that they had title to the materials and finished dresses, and were at liberty to dispose of them as of their own property. But the mere assertion of a claim is not enough to prevent the referee from taking jurisdiction. *Mueller v. Nu-*

gent, 184 U. S. 1, 46 L. Ed. 405; *May* v. *Henderson*, 268 U. S. 111, 69 L. Ed. 870. The claim must be more than colorable. * * * The property was in their possession as agents, or bailees, of the bankrupt, and was constructively *in custodia legis* at the time the claimants undertook to dispose of it. They should account to the trustee for the property which th y hold as such bailees."

To the same effect are

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402.
May v. *Henderson*, 268 U. S. 108; 69 L. Ed. 870, 874.
Gamble v. *Daniel*, 39 F. (2d) 447, 454.
In re Silverman, 299 F. 959.

At no time did the petitioners ever do more than assert that the Court had no jurdisdiction; at no time in the District Court did they present, or even make an assertion of an adverse claim. At no time did they do more than to refuse to turn over this money. At no time did they give the District Court any inkling of why they should not turn over the money or of the nature of any claim that they might have therein. They did, on the contrary, specifically consent to the District Court's taking jurisdiction of the entire Fund, distributing the major part of it, taking custody and control of the balance thereof, and deciding controversies concerning said balance and distributing it. (R. 39-41.)

F. A bankruptcy court has jurisdiction, before adjudication of the bankrupt, over controversies relating to the property of a bankrupt or property in the possession of a bankrupt.

Petitioners imply that a bankruptcy court has no jurisdiction over controversies relating to the property of a bankrupt or property in the possesion of a bankrupt until there is an adjudication. There is nothing in the decisions

which indicates that in situations of this kind the court should wait until adjudication. On the contrary, the court necessarily must exercise its powers and discretion before adjudication in a situation such as exists here. Property in the possession of the bankrupt or its agent or held for the bankrupt comes within the jurisdiction of the bankruptcy court immediately upon the filing of the petition. Jurisdiction of the bankrupt or the appointment of a trustee is not the determining factor of the court's jurisdiction over the property. It frequently happens that before adjudication a receiver appointed by the court takes possession of property held by the bankrupt, or its agent, or for the bankrupt, and, when it appears that the property held by the bankrupt or for it belongs to a third person, the court has the power to turn over the property to the person to whom it belongs or to order its receiver to turn it over, because that property is then in *custodia legis*. If the court did not have this power, great injustice would result to the owners of property held by a bankrupt or its agent in which the bankrupt had no ownership or only partial ownership.

For instance, on May 27, 1937 a great emergency existed in this case. If the court had not acted in turning over 75% of respondents' money to respondents (payment to the State was, in legal effect, turning it over to respondents to pay their taxes) respondents would have been subject to a penalty of 25% plus interest, or approximately $100,000. The Fund was in the custody of the court not only because it was then under the custody and control of the bankrupt and its agents, but because all parties concerned placed it under the custody and control of the court. That the court then acted before adjudication of the bankrupt was a matter of discretion and not one going to the court's jurisdiction, and if the court had *jurisdiction* to enter the order of

May 27th it had *jurisdiction* to enter the orders appealed from.

This rule has been frequently stated and applied. Thus, it is said in

8 Corpus Juris Secundum, Bankruptcy, Sec. 153, p. 600:

"Third persons having an adverse claim or title giving them the right to possession of property which has come into the custody or control of a bankruptcy court pending an adjudication may assert such title and claim possession of such property by proper proceedings in the bankruptcy court; but this is the only way in which such claims can be asserted, as the bankruptcy court, by reason of its possession of the property, acquires exclusive jurisdiction to pass thereon."

* * * * *

"Where several conflicting claims are asserted to property in the possession of bankruptcy receiver, the bankruptcy court thereby acquires jurisdiction to determine the rights of the respective claimants in the property although the receiver cannot possibly have any interest therein."

In

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir. 1932) 58 F. (2d) 721,

the court held that prior to adjudication it had jurisdiction of all property in its constructive possession; that it had constructive possession of property in the possession of the bankrupt's agent, even though the agent denied it was the agent and claimed the property belonged to it and not to the bankrupt, and that it could decide the question of jurisdiction by summary proceedings.

The law is clearly set forth in the case of

Denton v. *Gurnett*, (C. C. A. 1st Cir. 1934) 69 F. (2d) 750.

In that case there was apparently no adjudication of the

bankrupt and there was no trustee appointed. At the time of the petition in bankruptcy corporation stock belonging to A., which the bankrupt held as bailee, was in the actual possession of C. The receiver got the stock from C. Upon the petition of A. the court ordered the stock turned over to A. The opinion contains a full discussion on the jurisdiction and power of the bankruptcy court under such facts and circumstances.

See also:

5 Remington on Bankruptcy, 4th Ed. 1936, p. 580; par. 2379.

In re J. C. Winship Co. (C. C. A. 7th Cir., 1903), 120 F. 93, 96.

And in the instant case any objection to the fact that when the orders were entered adjudication had not been decreed was waived by petitioners when they agreed to the order of May 27, 1937.

Even if we assume that some objection could be made to the orders because there had been no adjudication when they were entered, no useful purpose would now be served by reversing them. No purpose would be served except to afford petitioners further delay in turning over to respondents their property. There has now been an adjudication made and trustee appointed. In their petition for certiorari petitioners failed to inform this Court that there had been an adjudication of the bankrupt from which no appeal had been sought. (Appendix, *infra*, p. 71.) But, as that fact was brought to this Court's attention in our motion to dismiss or affirm, petitioners now concede it.

G. The undisputed facts in the record refute petitioners' claim that this was a controversy between strangers to the proceedings and that Odell and Harris were not the agents of the bankrupt.

Petitioners argue (their brief, pp. 14-18) that the District Court had no jurisdiction of the Escrow Fund because the litigation was a controversy between strangers to the bankruptcy proceedings. Their argument takes no cognizance of the fact that (1) respondents' petition alleged that the Escrow Fund was held by the bankrupt and that petitioners in their relations to the Fund were the agents of the bankrupt; (2) these allegations were not denied and were conceded; (3) the Escrow Fund was merely an incidental part of a plan provided for in the contract of April 9, 1935, between the bankrupt and respondents, and that respondents' sales tax returns sent by respondents with their checks for the Escrow Fund and presumably showing the amount of respondents' estimated taxes and the amount they deposited in the fund, were in the possession of the bankrupt and its agents Odell and Harris; (4) the books and records of the bankrupt showing the amount each respondent had in the Escrow Fund were in the possession of Odell and Harris as the agents of the bankrupt; (5) the bankrupt and its agents Odell and Harris had refused to turn over respondents' property to them; (6) respondents claimed that all the money deposited by them in said Fund and their tax returns belonged to them and that said books and records of the bankrupt should be turned over to the bankrupt's Receiver, while the Receiver claimed that $20,000 of the amount deposited in the Fund by respondents and the books and records belonged to him and the bankrupt; and (7) petitioners made no claim of any kind except lack of jurisdiction of the Court.

Hardly a controversy between strangers to the bankptcy proceedings! However, "strangers to the bankptcy proceedings" are not miraculous words, the mere ention of which should cause a court in bankruptcy to un jurisdiction of property and controversies. A bankptcy court may have jurisdiction of a controversy beeen strangers to a bankruptcy proceeding when the propty which is the subject matter of the controversy is in *stodia legis*. Thus, in

In re Weston, (C. C. A. 2nd Cir.), 68 F. (2d), 913,

e property was a debt due the bankrupt, a contractor, om the State of New York for work done. Although the ate disputed the amount the bankrupt claimed was due, e court held the debt, whatever its proper amount, was *custodia legis* of the bankruptcy court. It, therefore, enined subcontractors who had filed liens against the fund rger in amount than the amount the bankrupt claimed as due, from proceeding in the state court, and held that e rights of the lien claimants had to be litigated in the nkruptcy court. The controversies in that case were ally between the lien claimants, strangers to the bankptcy proceedings. Yet, because they involved a debt fund in the constructive possession of the bankruptcy urt, that court and no other court had jurisdiction there-

Petitioners mainly rely upon the case of *Nixon* v. *Michls*, 38 F. (2d) 420. There the controversy was between tual strangers to the bankruptcy proceedings; it had no nnection with the bankruptcy proceedings; the bankptcy estate was closed and the property which was the bject matter of the controversy was in the possession a total stranger; and neither the bankrupt nor its trus- was claiming any part thereof. And in that case, im-

mediately following that part of the decision quoted by petitioners, the court said:

> "It is true that persons not parties to the bankruptcy proceedings may usually intervene or be brought in, when necessary to protect their rights in or to a *res* in the bankruptcy court."

The cases of *Henrie* v. *Henderson*, 145 F. 316, *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, and *Fulton Bank* v. *Hozier*, 267 U. S. 276, (the latter case was not, as petitioners state, in a bankruptcy court) are not in any way applicable to the facts in the instant case.

Petitioners' involved argument (pp. 18-24) about Section 23 of the Bankruptcy Act requires no answer. It is irrelevant because it is predicated upon an assumption that Sub-sections (6) and (7) of Section 2 of the Bankruptcy Act do not apply in this case. Petitioners claim that the Court has jurisdiction under Sub-section (7) of Section 2 only of property *owned* by the bankrupt, even though, when the petition was filed, the property was in the possession of the bankrupt or its agent or someone else holding for the bankrupt. There is no basis for petitioners' contention.

We have previously shown that if property is in *custodia legis* of the court, then controversies concerning it must be determined in the bankruptcy court no matter what the interest of the bankrupt may be.

In

Central Republic Bank & Trust Company v. *Caldwell*, (C. C. A. 8th Cir.) 58 F. (2d) 721,

the alleged agent of the bankrupt filed a petition to modify certain orders to the effect that the Receiver of the bankrupt before adjudication take possession of certain property in the possession of the alleged agent. The alleged agent claimed that it was not the agent of the bankrupt and

that the property belonged to it, not to the bankrupt. After quoting Sections 2 (7) and 23 of the Bankruptcy Act, the court said, p. 730:

"Construing these various statutory provisions as to the court wherein, and the character of proceeding (summary or plenary) whereby, the title to and rights in property adversely claimed may be adjudicated, several rules have been definitely stated: First, the bankruptcy court always has jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to proceed to examine and decide, in a summary proceeding, the merits of an adverse claim; second, the bankruptcy court has jurisdiction to examine and decide adverse claims if it has possession of the disputed property. If the preliminary examination as to the existence of jurisdiction develops that such possession is present, the bankruptcy court can determine the merits in the summary proceeding before it; * * *.

"The actual possession of this disputed property was, when the involuntary petition was filed, in the receiver of the Kentucky court. If possession was in the bankruptcy court, it was constructive possession; and constructive possession is sufficient basis for jurisdiction in the bankruptcy court to determine rights as to such property in a summary proceeding." (Citing cases.)

In

Whitney v. *Wenman*, 198 U. S. 539, 49 L. Ed. 1157,

the court, after discussing the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, cited by petitioners, said, p. 552:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists

to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the Federal courts. *In re Whitener*, 105 Fed. Rep. 180; *In re Antiago Screen Door Co.*, 123 Fed. Rep. 249; *In re Kelloggg*, 121 Fed. Rep. 333. In the case of *First National Bank* v. *The Chicago Title & Trust Company*, decided May 8 of this term, *ante*, p. 280, in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property.

See also

5 Remington on Bankruptcy, 4th Ed. 1936, Vol. 5, Par. 2382, p. 584.

Collier on Bankruptcy, 13th Ed., p. 771.

Hebert v. *Crawford*, 228 U. S. 204, 57 L. Ed. 800.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116, 119.

In re Bake-Rite Consolidated, 12 F. (2d) 468, 469.

But, say petitioners (their brief, pp. 24-34), Odell and Harris were not the agents of the bankrupt, and the Escrow Fund, being a deposit in a bank, was not and could not be property in the possession, custody or control of the bankrupt or its agents.

We believe that we have already demonstrated that the record indisputably shows—and without any attempt on the part of petitioners in the District Court to show otherwise—that the bankrupt and its agents Odell and Harris had possession, control and custody of the Escrow Fund and respondents' other property directly related to the Fund. In order to argue that Odell and Harris were not the agents of the bankrupt, petitioners resort to a misstatement of respondents' position. Petitioners would make it appear that respondents' position is that Odell, Harris *and Craig* were the agents of the bankrupt (Petitioners' Brief, pp. 24-25). From there they proceed to

rgue that Odell and Harris were not the agents of the ankrupt because the bankrupt had no control over Craig nd, therefore, did not have complete control over the scrow fund, and, therefore, had no control over Odell nd Harris. Respondents' position at all times was that Odell and Harris, *but not Craig*, were the agents of the ankrupt. It is true that because the bankrupt did not ontrol Craig it could not misappropriate the fund, but t is also true that the bankrupt, through its agents Odell nd Harris, had custody and control of the fund so that, owever willing and desirous Craig was to comply with espondents' wishes (Rec. 33, 47) respondents were not ble to exercise any dominion over the fund and have been leprived of it.

But, say petitioners, Odell and Harris could not be agents f the bankrupt because they were trustees for respondents, nd trustees are not agents: There were no trustees here; here were only custodians. The letter to the bank signed y Odell, Harris and Craig clearly so indicates (R. 27), nd the other allegations of respondents' petition so prove. R. 18-38.) Those custodians were Craig and the bankrupt, the bankrupt, a corporation, being represented by its gents Odell and Harris. But if, for discussion, we assume there were trustees, the trustees were Craig and the ankrupt, the bankrupt, a corporation, being represented y its agents Odell and Harris.

H. An undisputed bank balance under the control or ustody of the bankrupt or its agents is in the constructive ossession of the bankruptcy court and subject to its urisdiction.

Petitioners argue (their brief, pp. 27-30) that there was nd could be no possession of the bankrupt or its agents n this case sufficient to give the court jurisdiction because

the property was a bank balance in the National Builders' Bank. The law is directly to the contrary. Even a reading of the authorities cited by petitioners will so demonstrate. There might be something to the point if the property here concerned was merely a contested or disputed claim. The property here was a deposit in the bank, definite and certain in amount, admitted by the bank and which it was perfectly willing to turn over. Actually, the bank consented to the orders of May 27, July 12, and July 13, 1937. (R. 39-41; 46; 74; 97.)

That an undisputed account in a bank, under the control or custody of the bankrupt or its agents, is in the constructive possession of the bankruptcy courts and subject to its jurisdiction and control is well settled by numerous cases, including

May v. *Henderson*, 268 U. S. 108, 69 L. Ed. 870, 874.

Board of Trade v. *Johnson*, 264 U. S. 1, 68 L. Ed. 533.

In re Weston, et al. (C. C. A. 2nd Cir. 1934), 68 F. (2d) 913.

Twentieth Street Bank v. *Gilmore* (C. C. A. 4th Cir.), 71 F. (2d) 594.

In re Columbia Shoe Company (C. C. A. 2nd Cir.), 289 F. 465.

O'Dell v. *Boyden* (C. C. A.), 150 F. 731.

In re Hoey (C. C. A. 2nd Cir.), 290 F. 116.

In re Borok, 50 F. (2d) 75.

In re Wegman Piano Co., 228 F. 60.

Remington on Bankruptcy, 4th Ed. 1936, Vol. 5, pp. 567-569.

Petitioners cite *Board of Trade* v. *Johnson*, 264 U. S. 1, and *In re Roman*, 23 F. (2d) 556, in support of their asser-

tion. Neither support it; both actually refute it. Thus, in the case of

In re Weston, 68 F. (2d) 913,

the court said:

> "So debts due the bankrupt by third parties are within the constructive jurisdiction of the bankruptcy court. *In re Roman*, 23 F. (2d) 556; *In re Borok*, 50 F. (2d) 75, 77."

Petitioners' argument (their brief, pp. 30-34) that actual possession of the Receiver or trustee of the property is necessary for jurisdiction in a reclamation case has no support in principle or authority. Petitioners cite no case to support their position. In *Murphy* v. *Hofman, et al.*, 211 U. S. 562, the court was discussing jurisdiction when there was actual possession. It was not attempting to emphasize actual possession or distinguish between actual and constructive possession.

If a reclamation suit means reclaiming tangible property in the manual possession of the Receiver or trustee, the instant case was not a reclamation suit. Respondents were asking that a bank deposit in the custody and control of the bankrupt be turned over to them. Fundamentally, therefore, this was a reclamation suit just as were numerous other cases where manual possession of tangible property was not in the Receiver or the trustee, but where it was held that the bankruptcy court had jurisdiction of the bank deposit or Escrow Fund or chose in action for the purpose of determining to whom it belonged and of returning it to its rightful owner. Particularly is that true if, as here, there was a direct controversy between respondents and the Receiver of the bankrupt as to whether all of respondents' deposits in the Fund belonged to them or whether part belonged to them and part to the bankrupt.

In the instant case, however, when the orders appealed

from were entered, the District Court had more than constructive possession of the Escrow Fund.

On July 12th the District Court had had actual custody and control of the Escrow Fund since May 27th by the consent and with the approval of the petitioners and all other parties to the proceedings. (R. 41.) The order of July 12th provided for distribution to respondents of $48,580.40, leaving $20,000 in the Fund subject to the claims of any of the parties.

I. The District Court not only had jurisdiction, but it was the only court which had jurisdiction and to which respondents could have resorted.

The District Court not only had possession of the Escrow Fund, the Sales Tax returns and records, but it is the only court which had jurisdiction and to which respondents could have resorted. Had respondents instituted proceedings in any other court, the District Court undoubtedly would have and properly should have restrained them.

The case of

Orinoco Iron Co. v. *Metzel,* (C. C. A. 6th Cir.) 230 F. 40,

discusses this question as well as most of the contentions made by petitioners. In that case the U. S. Treasury held in escrow a fund for the benefit of the Orinoco Corporation which had been paid into the U. S. Treasury by the Republic of Venezuela. The Orinoco Corporation went into bankruptcy. One S claimed to have an equitable lien upon the entire fund and filed his bill in another court, and enjoined the trustee of the Orinoco Corporation and the Treasurer of the United States from paying out the fund. Other claimants to the fund appeared so that it seemed that none of the fund actually belonged to the bankrupt. How-

ever, the bankruptcy court enjoined the prosecution of the claim of ownership of the fund in any other court and interference with bringing the fund into the bankruptcy court to await adjudication of the rights of the respective parties thereto. The court said, p. 44:

"Was the fund in question in the possession of the bankruptcy court? The rule which gives the bankruptcy court exclusive jurisdiction to determine claims in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt." (Citing cases) "And we have held that a debt due the bankrupt's estate is so far constructively in the bankrupt's possession as to give the bankruptcy court jurisdiction to determine the rights of parties to it." * * *

"The question is whether the fact that the fund was held in the Treasury of the United States alters the rule. No question of the right of the United States to the fund is involved. The Government makes no claim to it in whole or in part. It is merely a custodian and a trustee, recognizing (so far as concerns the fund involved here) that it holds only for the bankrupt's estate." * * *

"A court of bankruptcy, in determining conflicting claims to property in its custody acts essentially as a court of equity; and we think the case presented is within the well-established rule that, where the necessary parties are before a court of equity, it is immaterial that the subject matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel a defendant to do all things necessary which he could do voluntarily to give full effect to the decree against him. Obedience to the decrees so made is enforced by means of process against the person." * * *

"The Supreme Court of the District of Columbia had thus, in our opinion, no jurisdiction over the suit whose prosecution has been enjoined by the bankruptcy court, not only because the jurisdiction of the latter court had already been attached, but because that jurisdiction, in the circumstances presented, is exclusive."

To the same effect are:

Board of Trade v. *Johnson*, 264 U. S. 1; 68 L. Ed. 533, 538.

Chandler v. *Perry*, 74 F. (2d) 371, 372.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116.

In re Weston, et al. (C. C. A. 2nd Cir.) 68 F. (2d) 913.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

A. and B. Petitioners voluntarily turned over the custody and control of the Fund from themselves, as agents of the bankrupt, to the District Court, and expressly agreed that the court had the right and authority to determine rights in and claims to the Escrow Fund and to distribute it. Even if the court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

Petitioners, together with the other parties interested in the bankruptcy proceedings, approved of and agreed to the order of May 27, 1937, which found that the District Court had jurisdiction of the Escrow Fund and the parties thereto and over the distribution of the entire Fund, including that part of it remaining after the payment of 75% to the Illinois Department of Finance. (R. 39-41.) Petitioners complied with the order of May 27th by (1) distributing 75% of the Fund, and (2) checking the amount that each of the respondents claimed to have de-

posited in said Fund. (R. 70, 79, 87.) Petitioners now object to the entry of the orders of July 12, and July 13, 1937, on the ground that the Court had no jurisdiction to order distribution of any part of the Escrow Fund. Thus, their appeal is based on an objection to an action of the Court which they expressly consented to, approved of and participated in. Courts have invariably held that under such circumstances a party is estopped from appealing and that the order appealed from should be affirmed without consideration of the merits of the cause. A leading case which presented a situation almost identical to that of the instant case is

McGowan v. *Parish*, 237 U. S. 287; 59 L. Ed. 955.

In that case plaintiff's testators were attorneys who had been retained on a contingent fee basis to enforce a claim against the United States. After they had rendered services, their client discharged them and retained other attorneys who finally had the claim allowed. The original attorneys thereupon instituted a suit in equity tying up the sum awarded to their former client and making the Secretary of the Treasury and the Treasurer of the United States parties defendant. A consent decree was entered by which all of the fund, except that which the original attorneys claimed, was paid to the client and the balance which was claimed by the original attorneys placed in a bank subject to the further order of the Court. In the suit to determine who was entitled to said balance of the fund, the defendant raised the question of the Court's jurisdiction over the fund.

This Court held that the objection of jurisdiction over the fund had been waived by the defendant by its consent to the decree ordering distribution of part of the fund to the defendant and that the balance be held subject to the order of the Court, and that this decree amounted to a waiver of jurisdictional questions.

The Court further held that no issue other than the one previously reserved by the consent decree could be raised by the defendant in her answer to the bill of complaint.

In *Bullard* v. *Commissioner of Internal Revenue*, (C. C. A. 7th Cir. 1937) 90 F. (2d) 144, the Court said:

> "* * * In (Freeman on Judgments) volume 2 (5th Ed.) Sec. 663, it is said: 'The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under the same circumstances and to the same extent as any other judgment.' In *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 684, 49 L. Ed. 1066, the court said: 'The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree in invitum. *Knobloch* v. *Mueller*, 123 Ill. 554, 17 N. E. 696; *O'Connell* v. *Chicago Terminal Transfer R. Co.*, 184 Ill. 308, 325, 56 N. E. 355.' In *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 314, 72 L. Ed. 587, the court adhered to the rule in the following language: 'But "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause." *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 28 L. Ed. 971. Compare *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 35 S. Ct. 543, 59 L. Ed. 955 * * *.'"

Petitioners contend that jurisdiction cannot be conferred by consent. In certain cases that is true. For instance, where jurisdiction is based on diversity of citizenship and where the record affirmatively shows that there was no diversity, that rule has been frequently applied. Such are most of the cases cited by petitioners. That is not the situation here. Here the record facts showed affirmatively that the Court did have jurisdiction of the Escrow Fund. However, any question of jurisdiction of the Court that could have been raised by any party based on any forced construction or interpretation of the undisputed facts al-

leged was expressly waived by the order of May 27th approved and consented to by all parties, including petitioners.

The same argument now made by petitioners was made by the defendants in the leading case of

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 578.

This Court said, L. Ed. p. 596:

> "Decrees entered by consent have been reviewed upon appeal or a bill of review where there was a claim of lack of consent to the decree's entry; * * * or a fraud in its procurement; * * * or that there was a lack of Federal jurisdiction because of citizenship of the parties; * * * but a decree 'which appears by the record to have been rendered by consent is always confirmed without considering the merits of the cause'." * * *

And, on p. 597:

> "It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent. * * * The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. * * * If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal. Such an error is waived by the consent to the decree. *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 59 L. Ed. 955, 963, 35 Sup. Ct. Rep. 543. Clearly it does not go to the power of the court to adjudicate between the parties." * * *
>
> "It is contended that even if the decree is not void as a whole, parts of it must be set aside as being in excess of the court's jurisdiction. * * * Moreover, the defendants, by their consent, lost the opportunity of raising the question on appeal. * * *"

On May 24th the first order on these respondents' petition of that date was entered without objection from petitioners. (R. 17-18.) On May 27th the second order was entered with the approval and consent of all parties, including petitioners. The same day petitioners complied with that part of the order of May 27th directing them to distribute 75% of the Escrow Fund. Afterwards, in the pleading filed by petitioners on June 3rd, they questioned only the right of the Court to distribute the Fund while there was pending the motion of the bankrupt to quash service upon it. (R. 54-56.) This motion was overruled on June 29th. (R. 75.) Thereupon these respondents petitioned that the part of the balance of the Fund, to which no claim had been made, be distributed to them. (R. 69-73.) Petitioners declined to plead to the merits of this petition but insisted that the Court had no jurisdiction to distribute the Fund because of defective service of process upon the bankrupt. (R. 73-74.) They reiterated a claim that had already been adjudicated, and presented no facts. Even had they presented facts to the Court showing that they were adverse claimants, which they never did, the Court would have had full jurisdiction and power to enter the orders of July 12th and 13th.

Thus, in

Page v. *Arkansas Natural Gas Corporation*, (C. C. A. 8th Cir.) 53 F. (2d) 27, affirmed in 286 U. S. 269, 76 L. Ed. 1096,

the Court said, p. 35:

> "In 5 Remington on Bankruptcy, Sec. 2195, p. 280, it is said: 'Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership

and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interest in the property, may be tried out in the bankruptcy proceedings.'

* * * * *

"Further, no objection to the form of proceeding appears to have been taken until too late."

To the same effect see:

Bachman v. *McCluer* (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936) Vol. 5, p. 330.

C. The claim of petitioners that they did not consent to what the order of May 27th actually says and that, if they did so, their consent was obtained by duress is frivolous and refuted by the record.

But, say petitioners, (their brief, pp. 34-40) assuming, arguendo, that jurisdiction can be conferred by consent, we did not consent. We approved of and agreed to the order of May 27th, but the order does not mean what it says and, therefore, we consented to what it means and not what it says, and, if it means what it says and we consented to it, our consent was obtained by duress.

A comparison of the statements made by petitioners with the record will serve as a reply to petitioners' argument. In our Statement of the Case we pointed out that almost all of the statements of fact upon which this argument of petitioners is predicated were contrary to the facts in the record. (*Supra*, pp. 15-17.) A few additional comments will suffice.

Petitioners say (p. 37):

"Its (the agreed order's) sole and total affect was merely an authorization by the court to your peti-

tioners, Craig and to the bank, to disburse 75% of the funds. It was merely permissive, and had no mandatory force or effect."

The order reads (R. 40):

> "It is hereby ordered, adjudged and decreed:
>
> "(1) That there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago * * * 75% of the proceeeds of checks of each said petitioner and each said other contractor deposited in said Fund * * *
>
> "(2) That Benjamin F. J. Odell, R. G. Harris and E. M. Craig sign instanter a joint check for $242,200 payable to * * * drawn on * * * signed as follows * * * and deliver said check instanter * * * ; that the National Builders Bank honor and pay said check * * *.
>
> "(3) That within 5 days the petitioners furnish the respondents an itemized statement * * *; that said list and the amounts thereof be examined and checked by Odell; that he report the result thereof to attorney for petitioner * * *."

They say that the language of the order "that the balance of the money in said Sales Tax Escrow Fund * * * shall remain and be held in said Fund, subject to the further order of the court" meant nothing; that it did not mean that it should remain subject to the jurisdiction of the Court and that it was really intended that such further order was to be an order dismissing the petition.

The argument, to speak bluntly, is frivolous. The argument also deliberately ignores part of the order. The order reads (R. 41):

> "4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.
>
> "5. That the time for William L. O'Connell, Jr.,

Receiver of the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee Wm. F. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."

Petitioners say (p. 38):

"At the time of the entry of the order, it was insisted by these petitioners and agreed in open Court that the consent requested by the Court to such distribution would not prejudice their rights to have determined the question of the jurisdiction of the Court over the 25% balance of said Fund."

As we have pointed out in our Statement of the Case, this assertion is untrue and refuted in every respect by the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement. Petitioners (their brief, p. 39) point to the testimony of counsel for respondents as supporting their unjustified assertion. That testimony, on the contrary shows that the only understanding was one between the attorney for the Receiver, the attorney for the bankrupt and the attorney for these respondents (and not with the petitioners or their attorney) that the consent of the bankrupt to the order of May 27, 1937, should not be deemed a waiver by the bankrupt of its motion to quash the service which was pending at the time said order of May 27th was entered. Mr. David's testimony was taken before the Referee on the hearing of the bankrupt to quash service upon it and was occasioned by the contention of the petitioning creditors that the bankrupt, by agreeing to the order of May 27th, had waived its motion to quash service. (R. 58; 61-62.)

Petitioners also argue that the consent order was of no consequence because respondents' petition upon which it was based contained no allegations which gave the Court jurisdiction. We have previously in our statement of the case and argument shown the contrary.

But a reference to respondents' petitions (R. 19-38; 69-73) will, in themselves, suffice to show the inaccuracy of petitioners' assertion. Petitioners seem to be under the impression that the order of May 27th was a nullity because respondent's petition of May 24th did not allege the date of the petition in bankruptcy or the date of the appointment of the Receiver so that a stranger to the controversy could get a full picture of the situation. The petition in bankruptcy, the appointment of the Receiver, the motion of the bankrupt to quash were of record and the Court certainly had the right to take judicial notice of its own proceedings and orders, and the fact that they were not mentioned in respondents' petition was of not the slightest consequence.

Under the facts in this case and the law applicable thereto, petitioners are estopped to complain of or appeal from the orders of July 12, and July 13, 1937.

III.

Petitioners Odell and Harris Are at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Have Been Ordered to Distribute to Its Owners, and Have No Other Interest Therein and, Therefore, Have No Appealable Interest.

Mere custodians or stakeholders of a fund who have no personal interest therein have no appealable interest in a decree ordering them to distribute the fund. It appears from the undisputed facts in this record that peti-

tioners have no personal interest in the Escrow Fund, part of which they were ordered to distribute by the order from which they appeal. The undisputed facts prove that they are mere naked custodians or stakeholders. (R. 27; 34; 39-41; 96-99.) Even if their express consent to the Court's distributing the Fund is not binding upon them, their consent to and approval of the findings of fact made by the Court (R. 39-41) which prove they have no interest in the Fund are binding upon them.

A. The fact that Odell and Harris have no interest in the Fund except as custodians or stakeholders is shown by the record.

The order of May 27th which petitioners approved and consented to was based upon the allegation of these respondents' petition of May 24th. The petition alleged the creation of the so-called Escrow Fund by the letter of May 2nd. (R. 23; 27-28.) In that letter Odell and Harris said:

> "The funds are not the funds of the undersigned but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois."

The petition alleged not only that the "proposed negotiations with the Department of Finance", but also the litigation subsequent thereto had terminated (R. 30), and the order found that there was then on deposit in the Fund $314,885.96 as alleged in the petition; that the greater portion of said Fund was the proceeds of checks of these respondents which were deposited in the Fund; and that the portion of the Fund not the proceeds of respondents' checks were the proceeds of checks of other contractors represented by the petitioner Odell. (R. 39-40.) The consent order of May 27th thus found that the

Escrow Fund consisted of moneys which belonged to respondents and to other contractors represented by Odell (R. 39-40), and therefore that petitioners had no personal interest therein. It did appear from the petition that because of the contract of April 9, 1935, the alleged bankrupt or its Receiver might have a claim to $20,000 of said Fund. The petition of June 29th and the order of July 12th confirmed all the above facts. (R. 69-73; 96-99.) Nowhere is there any finding or can any inference be drawn from any pleading or finding in the entire record that petitioners had any interest in the Escrow Fund other than as naked custodians thereof.

Petitioners say, however, that, had they not been deprived of the right to plead to the merits, they would have shown that they were not mere stakeholders or custodians of this Fund. Concerning this the Court of Appeals said:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have exerted such claim. It cannot be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record that they could have no interest or claim for services rendered in connection with the litigation of the matter of the Sales Tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without costs to appellees." (R. 133.)

Petitioners have no interest in the Fund ordered to be istributed. They therefore have no appealable interest, nd no right to appeal.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

B. At no time in the District Court did petitioners show r attempt to show, or even claim, that they had an inter- t in the Escrow Fund other than as custodians or stake- olders. Their present assertions that they have such in- rest were not made in the District Court, and are predi- ted upon their unsupported statements in their brief with basis therefor in the record.

To contradict the facts in the record and the statement the Court of Appeals that it appears from the record at petitioners have no interest in the $48,580.40, petition- rs, ignoring the record, state at length (their brief, p. 52) hat the answer of petitioners would have revealed had ey been allowed to file it.

They were directed on June 29, 1937, to answer respond- nts petition of June 29th and stated they did not desire answer it. (R. 74.) After the order of July 12th was tered, petitioners were directed to answer to the merits ncerning the balance of the $20,000 left in the Fund. (R. 9-100.) They refused to do so and filed "a special an- wer" merely reasserting that the Court had no jurisdic- on over the Fund. (R. 110.) Now, for the first time, they esire to reveal their so-called interest in the Fund.

As petitioners' unsupported assertions concerning the contents of their hypothetical answer have no reference or relevancy to the record before this Court, they are impossible to answer and require no answer. Petitioners have suggested in various places throughout their brief that because they had an interest in the Escrow Fund they were trustees, not agents, and that they were adverse claimants and, therefore, summary proceedings were not proper. It is decidedly pertinent that no claim of an interest in the Fund or adverse claim of any kind was ever suggested by Odell and Harris in the District Court. If petitioners believed that the Court had no jurisdiction to act because they were not agents of the bankrupt or to act summarily because they had an adverse claim, all they would have had to do was to have alleged in their pleas of jurisdiction some facts showing that they were not holding as agents of the bankrupt or evidencing some adverse claim. It was not until they were in the Court of Appeals that these suggestions were made.

However, their present statement as to what they would have shown had they allegedly not been deprived of pleading to the merits itself demonstrates that they have no interest in the Fund except as naked custodians thereof. For instance, what interest in the Fund has Harris? None has ever been suggested. Odell relies largely upon a document which petitioners present to this Court in their brief (p. 63), but which they did not set up in their pleas of jurisdiction or offer in evidence on the hearing before the Referee. The document itself which Odell so confidently relies upon shows on its face, we submit, that his interest in the Fund or his adverse claim is non-existent. But, assuming, for discussion only, that Odell actually did have agreements with some of respondents by which they agreed to pay him reasonable fees for his services, or assuming that he is entitled to re-

cover against some of respondents on a *quantum meruit* (both of which assumptions are nullified by the record and by the document not in the record contained in petitioners' brief), has he thereupon a lien or an interest in the Sales Tax Escrow Fund? Petitioners claim in their brief that Odell is a joint trustee of the Escrow Fund. If he is a trustee of a Fund belonging to over 300 contractors, then, under no legal theory has he a lien on or an interest in the Fund merely because he may have claims for legal services against some of the owners of the Fund arising out of personal contracts between them and him.

Neither by statute nor common law has a lawyer a lien on or an interest in a trust of which he is one of the trustees, merely because one or some of the beneficiaries of the trust owe him money for legal services. The Illinois Attorneys' Lien Statute merely gives a lien to an attorney on a money judgment or decree obtained by means of legal services performed by the attorney pursuant to contract with his client. There was no money judgment or decree obtained by Odell for any of respondents, but, even if there had been, petitioners are not suggesting that Odell has a lien on or an interest in a judgment or decree, but in a Fund of which he claims to be one of three trustees and of which he says there are over 300 beneficiaries. His claim is without basis or merit. See

Lewis v. *Canadian Pacific Railway Co., et al.*, (C. C. A. 7th Cir. 1930) 39 F. (2d) 834,

which opinion cites numerous cases, including

Cameron v. *Boeger*, 200 Ill. 84,

and

Story v. *Hull, et al.*, 143 Ill. 506.

Petitioners say their answer would have shown that there is an injunction pending in another court. Of course, this is totally outside the record, but even the record before this

Court indicates that there is no such injunction. If such an injunction existed, why, on May 27, 1937, did petitioners not bring it to the attention of the Court? Why were they willing to, and why did they, deliberately violate it by distributing $242,200 of the Fund? If it existed, why did the parties who obtained the restraining order in this Court consent to the orders here appealed from? If it existed, why did petitioners first discover its existence (although they say they were the persons enjoined) when this case was pending in the Circuit Court of Appeals?

Petitioners say that their answer on the merits would have shown that the Escrow Fund was subject to an attorney's lien, "as Odell had not been paid for his services rendered the contractors for engaging him and for whom he had been eminently successful."

Respondents' original petition alleged the facts concerning the contractors' suit, and the consent order of May 27th could not have been agreed to by the parties or entered by the Court if the facts so alleged in respondents' petition had not been conceded to be true by all concerned. *The contractors' suit was decided against the contractors.* A reading of the opinion in

Blome, et al. v. *Ames, et al.*, 365 Ill. 456,

is all that is necessary to determine that fact. But, even if the contractors had won that case, petitioners would have had no interest in the $48,580.40 which they refused to release. Petitioners were not to get anything out of the Escrow Fund if the suit was successful. The alleged bankrupt, and it only, was to get $20,000 if the contractors were held to be exempt from the Sales Tax. $20,000 of respondents' money was reserved by the Court in its order of July 12th, subject to all claims and rights of all persons (which included Odell and Harris) in and to said $20,000. (R. 98-99.) The claim that Odell is entitled to a lien on the $48,-

580.40 ordered distributed because of services rendered to the contractors for whom he had been "eminently successful" can be described only as fantastic.

A natural query arises: why should Odell and Harris go to the trouble and expense of this appeal? Why did they object to distributing a part of the Fund in which they have no possible interest? Why the strenuous claim on their part that the Federal Court had no jurisdiction? We suggest that it is a fair inference that they have attempted to delay the distribution of money in which they have no interest to cause annoyance and expense to the owners thereof, in the hope that their tactics may ultimately result in some material advantage to them.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

Petitioners charge that the District Court deprived them of a hearing on the merits, and abused its discretion in disregarding equity and bankruptcy rules, that the attorney for respondents was guilty of unethical conduct, that the District Court approved false orders and then misconstrued them, and that the Circuit Court of Appeals did the same.

Petitioners' charges are without basis in the record. Most of them are predicated upon the charge that the order of June 29th (R. 73-74) was a false order and misconstrued by the District Court and the Circuit Court of Appeals. We have previously remarked about this assertion. (*Supra*, p. 15.) The balance of petitioners' charges are based upon their unsupported statements made in their brief and which they ask this Court to accept as complete refutation of record facts.

This is what the record actually shows: On May 27th petitioners agreed, as did all other parties, that the Court had jurisdiction over the Escrow Fund and over the other property of petitioners then in the possession of the bankrupt and its agents, Odell and Harris. On June 3rd petitioners filed a special motion or answer of lack of jurisdiction in the Court based solely upon the fact that there was still pending undisposed of a motion of the bankrupt to quash service upon it. (R. 54-55.) On June 29th the Court overruled the bankrupt's motion to quash and decreed that the bankrupt had appeared in the cause generally and the Court had jurisdiction to determine the merits of the cause. (R. 75-76.) Then, and not until then, respondents' petition of June 29th was filed. No one except Odell, Harris and the bankrupt objected to the entry of an order in accordance with the prayer of the petition, (R. 74, 97) and the bankrupt did not stand upon its objection. The Court directed Odell and Harris to answer to the merits of the petition. They said they did not desire to do so but desired to stand on the special motions or answers they had filed to the petition of May 24th. (R. 74.) The Court said in substance: "But I have decided that question of jurisdiction by overruling the bankrupt's motion to quash and therefore direct you to plead to the merits." Odell and Harris refused to plead. There was nothing then before the Court except a question of law that the Court had already decided. However, the Court gave the petitioners full opportunity to argue the question before the Referee. When the Referee made his report Odell and Harris asked leave to file exceptions and filed them. (R. 92, 97.) The exceptions were considered and overruled (R. 98) and the order of July 12th was entered. Even then no motion was made to file an answer on the merits. *After* the entry of the order of July 12th, petitioners asked leave to file, not an answer on the merits, but a second amended

supplemental answer, (R. 96) which answer, considering what had proceeded and what followed, would merely have been another attack on the jurisdiction of the Court. The next day, July 13th, the Court entered an order concerning the $20,000.00 of respondents' property, which would remain in the fund if the $48,580.40 was distributed as provided for by the order of July 12, 1937. The Court again overruled petitioners' special motions or answers of lack of jurisdiction based upon the bankrupt's motion to quash which had been overruled, and directed petitioners to answer to the merits within twenty (20) days as to this $20,000.00. (R. 99-101.) They answered but not to the merits. They claimed the Court had no jurisdiction to order them to answer to the merits. (R. 110-111.)

In considering petitioners' claim that they were deprived of a right to plead to the merits it should be noted that in spite of the numerous opportunities given them to plead to the merits they consistently refused to do so; that their position in this Court concerning the District Court's lack of jurisdiction was never presented in the District Court; that their claim in the District Court of its lack of jurisdiction was predicated solely on the alleged fact that the Court did not have jurisdiction of the bankrupt; that the Court had taken preliminary jurisdiction of the bankrupt when the petition in bankruptcy was filed on May 3rd, and on June 29th, before the orders here appealed from were entered, had adjudicated that it had full jurisdiction of the bankrupt and to hear the cause on its merits; that in petitioners' special motions or answers to the jurisdiction not a single fact was alleged; that petitioners' position is that they have a right to reserve answering on the merits until their claim of the lack of jurisdiction of the District Court is decided against them not by the District Court, but by the District Court, the Circuit Court of Appeals, and this Court.

The order of June 29, 1937, finds that petitioners stated they did not desire to answer respondents' petition but desired to stand on their special motions or answers. Petitioners say this order is false; that at no time did they say they did not desire to answer the petition or be heard on the merits (Petitioners' brief, p. 51). This presents the following situation: The record unequivocally shows that petitioners stated that they did not desire to answer the petition and made no attempt to offer any evidence on the merits, and that the District Court, by overruling petitioners' exceptions which asserted the order was false, expressly found that petitioners' claim that the order was false or incorrect was not true. To refute all this we have the unsupported assertion of petitioners.

Petitioners claim (their brief, p. 51) that error was committed because the Referee recommended the signing and honoring of the check for $48,580.40, although the order of June 29th did not refer the matter to the Referee on the bank's answer and the bank had not been present at the hearing. They blithely ignore the fact that the bank and all other parties except the petitioners, had already consented to the prayer of respondents' petition. (R. 74, 97.)

The reference to William L. Sullivan was not a reference to him as a Referee in Bankruptcy, but as a Special Master, because there had been no adjudication of the alleged bankrupt. Therefore Rule 14 of the Bankruptcy Act is not applicable. Equity Rule 66, if at all applicable, was in no way violated. In any event the Court was not bound to follow Equity Rule 66. The equity rules are to be looked to as analogies but not as rules binding upon the Bankruptcy Court.

In Re Kenney & Greenwood, 23 F. (2d) 681.

International Harvester Co. v. *Carlson*, 217 F. 736.

Under the circumstances which existed here, when there was only one question before the Court, and that of law with no testimony or disputed facts, it was even superfluous for the Court to refer the case to the Master or to give the respondents leave to file exceptions to the Master's report. On June 29, 1937, the matter of jurisdiction over the bankrupt had been decided by the Court. That question was no longer before the Court, but the petitioners said in effect: "We refuse to answer to the merits; we stand upon the position that the Court has no jurisdiction in this case because it has no jurisdiction over the bankrupt." That this was petitioners' position and their only position is proved by the fact that when they were directed to answer to the merits as to the $20,000.00 (even after they had refused to answer to the merits concerning the $48,580.40), they again said: "We refuse to answer to the merits, we intend to stand upon our position that the Court has no jurisdiction because it has no jurisdiction of the bankrupt." And petitioners seem to have the impression (their brief, p. 54) that in a Trial Court they can file a plea of jurisdiction, have that plea overruled, refuse to plead to the merits, say they will stand upon their point of lack of jurisdiction, and then, after the Court has entered an order upon the basis of the facts before it in the sworn pleadings, claim that the order should be reversed because the Court refused to grant them leave to plead to the merits.

Petitioners go so far as to say that, although the bankruptcy petition alleged that the alleged bankrupt was a moneyed, business or commercial corporation within the purview of the Bankruptcy Act (R. 2), and although on June 29th the Court overruled the bankrupt's motion based upon the ground that the Court had no jurisdiction over it, and decreed that it had jurisdiction of the bankrupt and of the merits of the cause (R. 75-76), and al-

though later the Court expressly adjudicated that the bankrupt was a moneyed, business or commercial corporation within the purview of the Bankruptcy Act (Appendix A, *infra*, p. 71), this cause should be reversed because petitioners still claim that the bankrupt is a corporation organized not for pecuniary profit and is, therefore, not within the purview of the Bankruptcy Act, and this is a question of jurisdiction over the subject matter and still open to collateral attack. (Petitioners' brief, p. 56.) Their argument answers itself, but it may be suggested that the question of whether the bankrupt was or was not a business corporation is a question of jurisdiction of the person, *i. e.* the bankrupt, and not of the subject matter.

Petitioners say (their brief, p. 58) that the Tax Service Association requested an immediate hearing on June 29th, but the matter was continued until September 21st, and that they cannot refrain from comparing this delay with the speed and facility with which the Escrow Fund litigation has been handled. The bankruptcy petition was filed May 3, 1937 (R. 2). In his report filed July 8, 1937, over two months later, Referee Sullivan said:

> "While it is, of course, only right and proper that a corporation, against whom an involuntary petition in bankruptcy is filed, should be entitled to an early hearing consistent with the rules and convenience of the court, yet in this case the alleged bankrupt corporation certainly had done nothing up to this time to facilitate an early hearing upon the involuntary petition against it." (R. 90.)

It is submitted that the District Court exercised its discretion wisely, that it treated petitioners with more patience and consideration than they deserved, and that it gave them ample time and full opportunity to present their claims and their rights.

Conclusion.

The petitioner, Benjamin F. J. Odell, is an attorney selected by the bankrupt to act for respondents without charge to respondents. He was not only the selection of the bankrupt, but was to be paid by the bankrupt. The petitioner, Roy G. Harris, is the President of the bankrupt. Together, the bankrupt, Odell and Harris devised the neat scheme of not merely making the $21,500 if they were successful in the Sales Tax Litigation, but of also having respondents put a large sum of money in their custody and control so that, if they were unsuccessful in the litigation, respondents would nevertheless be unable to obtain their money unless they met petitioners' demands. When petitioners were confronted by the possibility that their refusal to turn over respondents' money to respondents might subject them to a personal liability of $100,000, they consented to the District Court's taking jurisdiction of the Escrow Fund and distributing it. Then, believing that they had relieved themselves of the possibility of that personal liability, they attempted to retract their consent and claim that the Court had no jurisdiction. They have no interest in the Fund, certainly not that part of the Fund which the Court ordered them to turn over to respondents.

Under these circumstances and for the reasons above set forth, it is respectfully submitted that the orders of the District Court of July 12, and July 13, 1937, and the orders of the United States Circuit Court of Appeals affirming with costs said orders of the District Court, and ordering that petitioners pay to respondents interest on $48,580.40 at the rate of 5% per annum from July 12, 1937, until said $48,580.40 is paid, are correct, just and proper, and should be affirmed.

It is further respectfully submitted that petitioners' ap-

peal to the Circuit Court of Appeals and their Writ of Certiorari from this Court have been prosecuted merely for the purpose of delay; that the questions on which the decision of this cause depends are trivial and unsubstantial; and that this Court should, therefore, also enter an order assessing against petitioners damages in the sum of 10% of $48,580.40, in accordance with Rule 30 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,

Attorney for Dahl-Stedman Co., et al., Respondents.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES.
For the Northern District of Illinois,
Eastern Division.

In the Matter of TAX SERVICE ASSOCIATION OF ILLINOIS, a corporation, Alleged Bankrupt.	In Bankruptcy No. 65890.

ORDER APPROVING REPORT OF SPECIAL MASTER, ORDER OF ADJUDICATION IN BANKRUPTCY, ETC.

This cause coming on to be heard upon the motion of the petitioning creditors for the approval of the report of Special Master William L. Sullivan, with reference to the involuntary petition in bankruptcy and the second amended answer filed thereto, and upon the exceptions of the alleged bankrupt heretofore filed to the said Special Master's report. • • •

And the Court having heard arguments of counsel and having considered the said Special Master's report, the exceptions of both the alleged bankrupt and the petitioning creditors filed thereto, the transcript of evidence, the pleadings, the abstracts and the briefs of the respective parties, and being fully advised in the premises, finds:

• • •

2. That this Court has jurisdiction of the subject matter hereof and of the parties hereto.

3. That on the day of the filing of the involuntary petition in this cause, and prior thereto, the alleged bankrupt was and is a moneyed business or commercial corporation

amenable to an involuntary petition in bankruptcy within the purview of the Bankruptcy Act.

* * *

10. That an order should be entered forthwith adjudicating Tax Service Association of Illinois a bankrupt and referring this cause generally to a Referee in Bankruptcy;

* * *

It is further ordered that Tax Service Association of Illinois, a corporation, be and it is hereby ordered adjudged a bankrupt and this case be and it is ordered referred generally to the Honorable William L. Sullivan, Referee in Bankruptcy, and that a rule be and the same is hereby entered upon the alleged bankrupt to file its schedules in this cause within Ten (10) days from and after the date hereof.

* * *

ENTER:

PHILIP L. SULLIVAN,

Judge.

To the entry of which order the alleged bankrupt excepts.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, HENRY W. FREEMAN, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Order entered April 27, 1938, In the Matter of Tax Service Association of Illinois, a corporation, in bankruptcy No. 65890 now remaining among the records of the said Court in my office.

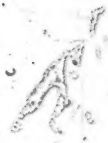
I further certify that to the date hereof no Appeal has been taken from said Order.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 13th day of September, A. D. 1938.

HENRY W. FREEMAN,

(SEAL)

Clerk.



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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY BRIEF FOR RESPONDENTS.

SIGMUND W. DAVID,
Attorney for Respondents.

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WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY BRIEF FOR RESPONDENTS.

Respondents desire not to overburden this Court, and therefore file this reply brief with reluctance. But some of the assertions and arguments in petitioners' reply brief require brief comment.

This Court can easily determine whether petitioners or respondents have stated the record facts accurately. Petitioners claim that what respondents have characterized as misstatements on petitioners' part are fair inferences from the record. We suggest to the Court that it refer specifically to the contract of April 9, 1935, and the allegations concerning the same. (R. 22-28.) If the inference can be drawn therefrom that Odell's compensation was not to be paid to him by the bankrupt out of its contingent compensation of $20,000 and that Odell was to be paid an additional fee by the individual contractors—which is the inference

which apparently is the sole basis for petitioners' refusal to turn over to respondents their money—then we admit that we have totally misread and misunderstood the contract of April 9, 1935. We submit that the contract is explicit and clear on at least two points: (1) no compensation (other than the $1,500 retainer which was paid) was to be paid to the bankrupt unless the contractors were held *exempt* from the Illinois Sales Tax; (2) for the purpose of accomplishing the aims of the contract an attorney was needed, as the bankrupt, a corporation, could not practice law and, therefore, Odell, an attorney, was retained by the bankrupt for the contractors but without expense to the contractors; that Odell, although in name the attorney for the contractors in the litigation, was, in fact, acting as the agent of the bankrupt in order to enable it to perform its contract.

Odell was selected by the bankrupt, not by the contractors. (R. 25.) In acting as a custodian of the Escrow Fund, which was explicitly provided for in the contract itself, Odell was continuing to act in his capacity as agent of the bankrupt. As the Court of Appeals said:

> "The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt." (R. 132.)

If petitioners' statements are fair inferences from the record, it is inconceivable how they could make such different statements of the facts in their petition for certiorari (p. 2) and in their main brief (pp. 2-3).

Petitioners are not accurate when they state that the only allegation in respondents' petition concerning the fact that Odell and Harris were the agents of the bankrupt is that part of the petition quoted on page 3 of their reply brief. Numerous other allegations of the petition relating in detail

the relationship of the parties, the purpose and method of setting up the Escrow Fund and the payment of respondents' taxes (R. 22-28, 30, 33-34) show that Odell and Harris were acting throughout merely as agents of the bankrupt. Attention is called to the opinion of the Court of Appeals on this question; (R. 132) in quoting therefrom in their original brief (p. 13), petitioners omitted from the body of the part of the opinion quoted significant and vital parts thereof.

The contract of April 9, 1935, provided that, if the contractors were held exempt from the Sales Tax, the bankrupt was to receive additional compensation in an amount equal to the calculated net savings to the contractors for the three calendar months next preceding said saving, but, in no event, in excess of $20,000. (R. 23.) If the *Blome* case had decided that the contractors were exempt from the tax, the $315,000 they had in the Escrow Fund would have been saved. The escrow period covered 24 months (from April, 1935, to April, 1937) and, if the average be taken, the last three months' savings would have been one-eighth of $315,000, or approximately $39,000. By the contract, however, the contingent fee to be paid by the contractors was limited to $20,000. There was *no* provision in the contract for payment to the bankrupt of any additional compensation if the Court should hold the contractors liable to the tax but to a less tax than they were paying. Actually, nothing in *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, reduced the liability of the contractors. The only thing decided in the contractors' favor in that opinion was that the Director of Finance "was without power to control the appellants' (the contractors') method of billing to or the form of their contracts with owners". Most decidedly, $72,000 was not saved to the contractors by the decision in the *Blome* case. (R. 40.) But, assume that it was. If $72,000 was saved to all the contractors in the Escrow Fund and $68,500 was saved to re-

spondents for 24 months' taxes, then the average savings for the last three months to respondents was approximately $8,600. By the order of July 12, 1937, here appealed from, $48,580 was ordered distributed to respondents and $20,000 of respondents' money was reserved, subject to all claims of anybody making a claim. This $20,000 was the limit of respondents' liability to the bankrupt and Odell, had respondents been held exempt from the Sales Tax. Therefore, assuming, for the purpose of discussion, the truth of all the assertions made by petitioners regarding Odell's "successful efforts", how can petitioners, for allegedly saving respondents $68,580, possibly assert or have any claim against the excess over the $20,000, which excess was the only part distributed by the order of July 12, 1937.

Petitioners' assertion that respondents abandoned their claim to the books and records in the agreed order is not correct. In fact, it is just contrary to the record. The order provided that, after a checking by Odell and the attorney for respondents, "if there be any differences between the figures furnished by petitioners and the figures in the hands of Odell, said differences be determined by this court" (R. 41), which meant that the Court took jurisdiction over, and control and custody of, the books and records for any necessary purpose.

The statement of petitioners (their reply brief, p. 7) is interesting. Petitioners assert that respondents contend for a construction of the contract of April 9, 1935, under which Odell was to work gratuitously, even if successful. Respondents never contended for such a construction; they have merely contended, and now contend that the contract should be construed to mean what it says and not to mean just the opposite of what it says. The contract was between respondents and the bankrupt, and agreed to by Odell. What Odell did agree to was that, if the litigation for the contractors was successful in having the contractors

held exempt from the Sales Tax, the bankrupt was to get $20,000, and, if the litigation was not successful in having the contractors held exempt from the tax, the bankrupt was to get nothing, and that in any event Odell was to receive nothing from the contractors. Whatever Odell was to be paid, he was to receive from the bankrupt. Respondents alleged in their original petition (R. 26):

> "They are informed and believe and, upon such information and belief, charge the fact to be that said Odell received part of the aforesaid $1,500 paid to the Tax Service Association of Illinois, and had an agreement with said Tax Service Association that he would receive part of the further amount to be paid to the Tax Service Association of Illinois under the terms of said agreement of April 9, 1935, in case a favorable decision exempting the contractors from said tax was obtained." (R. 26.)

Odell having made an agreement by which he was to be paid by the bankrupt out of its contingent compensation is now taking a position directly contrary to the terms of his agreement. And it is apparent that his position, directly contrary to the terms of his agreement, is the sole basis for his refusal to comply with the order of July 12, 1937, and for this appeal. His position, tersely stated, is (1) although the arrangement made by the contractors was one that they pay compensation to the bankrupt (from which Odell was to receive his fees) contingent upon the contractors' being held exempt from the tax, the contractors must pay compensation even though the contingency never happened; (2) although the contract provided that whatever was to be paid by the contractors was to be paid to the bankrupt, not to Odell, and Odell agreed to that arrangement, he (Odell) is now entitled to compensation even though the bankrupt is not; and (3) although the bankrupt was to get a maximum of $20,000 if the respondents were held *exempt* from the Sales Tax, and although they were not held exempt from the tax, yet the compensation owing by the respondents exceeds $20,000.

Petitioners' Points I (1) and (2).

Respondents pointed out in their brief that Odell and Harris never alleged any facts in their pleas of lack of jurisdiction of the Court; that their pleas (R. 54-55) were actually based entirely upon the contention that so long as the bankrupt's motion to quash service upon it was pending, the Court had no jurisdiction; that this motion of the bankrupt to quash service was overruled before the orders here complained of were entered; (R. 76) that, therefore, petitioners' present contentions concerning the Court's lack of jurisdiction were raised in the Court of Appeals for the first time. Petitioners have not denied the above statements of fact nor have they attempted to explain why, in view of said facts, petitioners' points about jurisdiction, upon which their appeal is predicated, should be entitled to any consideration.

Simply for the purpose of illuminating the method of argument petitioners have pursued throughout their briefs, reference is made to their comments on *Nixon* v. *Michaels*, 38 F. (2d) 420. (Their reply brief, p. 8.) In respondents' brief (pp. 39-40) respondents distinguished the *Nixon* case from the instant case on four distinct grounds, one of which was "the bankruptcy estate was closed and the property which was the subject matter of the bankruptcy was in the possession of a total stranger". Petitioners, in their reply brief, in endeavoring to show that respondents' comments distinguishing the *Nixon* case were not sound, state two of the four grounds of distinction made by respondents, and omit two, including the main one just quoted. For further illustration of petitioners' method: in attempting to distinguish the cases cited by respondents on the subject of consent, petitioners say (their reply brief, p. 19) that the cases respondents cited "are cases in which the very orders consented to were appealed from. Not so in case at bar."

The leading case cited by respondents, *McGowan* v. *Parish*, 237 U. S. 287; 59 L. Ed. 955 (respondents' brief, p. 49), was one very similar to the instant case, where the order consented to was *not* the order appealed from. And petitioners' alleged distinction is similarly not sound as applied to *Page* v. *Arkansas Natural Gas Corp.*, 53 F. (2d) 27, affirmed 286 U. S. 269, 76 L. Ed. 1096, or to *Bachman* v. *McCluer*, 63 F. (2d) 580, 583, also cited by respondents.

Petitioners are in error in their idea that Section 2 (7) has no connection with the jurisdiction of a bankruptcy court over reclamation suits. It is the fact that some cases say that when property is in the actual possession of the bankruptcy court it has inherent jurisdiction, irrespective of the bankruptcy statute, to dispose of it. By reason also of Section 2 (7) a bankruptcy court has jurisdiction of all property in the possession, custody or control of the bankrupt or its agent at the time the petition is filed. That is not merely actual possession, but is possession, actual or constructive, or custody or control. Therefore, under this section of the bankruptcy statute the Court has jurisdiction of a reclamation suit by which it determines whether any property in *custodia legis* is the property of a third person or of the bankrupt. See the discussion in

Page v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27, affirmed 286 U. S. 269, 76 L. Ed. 1096,

which deals with (p. 33) the case of *Murphy* v. *Hofman*, 211 U. S. 562; 53 L. Ed. 327, relied upon by petitioners as the basis of their claim that only actual physical possession is the basis of a reclamation suit, and follows with a discussion of the law as stated above.

Petitioners' Point I (4).

For emphasis, petitioners have repeated in their reply brief the same assertions made in their original brief, namely, that the Escrow Fund was not in the control of the bankrupt or its agent, because Craig was not its agent, and that an agent must hold the property unconditionally subject to the sole order of the bankrupt. Petitioners again cite the same two cases in support of their assertion. We respectfully request the Court to examine those two cases. Neither, we submit, supports the proposition for which petitioners are contending in the instant case.

In one of the cases, *Buss* v. *Long Island Storage Warehouse Co.*, 64 F. (2d) 338, the trustee of the bankrupt K. attempted to charge defendant warehouse company with the value of goods it had delivered to one C. after bankruptcy against K. The trustee claimed that the defendant warehouse was, at the time of the petition in bankruptcy against K., the bailee of K. and, therefore, that the goods were in *custodia legis* and the defendant wrongfully turned them over to C. The defendant warehouse company claimed that the Court had no jurisdiction. The question was decided upon the facts that at the time the petition against K. was filed the defendant was not the bailee of K., that the bankrupt K. or his receiver in bankruptcy had never asserted a right against the defendant which would have made K. the bailor and the defendant the bailee, and that, under the facts, the defendant had the right to turn the goods over to C. because the defendant was not the bailee of the bankrupt.

In the other case cited by petitioners, *Sproul* v. *Levin*, 88 F. (2d) 866, the facts came out during the hearing of the evidence on a motion of the bankrupt K. for release from imprisonment. These facts showed that before the petition in bankruptcy was filed K. had drawn in cash

some money from a bank, which he gave to his wife in payment of some alleged loans, which the wife later gave to her sister in alleged payment of the sister's interest in the loans to K., and that afterwards the sister turned the money over to appellant as bailee. The appellant, who had no interest in the funds, was summarily ordered to turn this money over to K.'s trustee. The court held that this could not be done because the entire record in the case was merely the evidence in another proceeding in which appellant was a witness and to which he was not a party; that the person who actually claimed the money, namely, the sister, was also not a party to the proceedings and had no chance to defend her interest, and that the evidence showed, if anything, that the appellant was a bailee for the sister and not for the bankrupt.

Upon the question of exclusive control and bailment about which so much has been said by petitioners, we refer the Court to the case of

In re Goldman, 5 F. Supp. 973,

inadvertently omitted from respondents' main brief. So far as this particular question is concerned, the facts are quite similar to those in the instant case. G. and O. had a dispute which was settled by an agreement between G. and O., one of the terms of which was that certain Television stock was placed in the possession of R. as escrowee, to deliver to G. at the end of one year under certain conditions. G. was declared bankrupt and T. was appointed his trustee. O. filed suit in the state court against G. and R., claiming that the entire settlement by which the stock was placed in R.'s possession for G. was void and that O. was entitled to delivery of the stock from R. T. made a motion in the bankruptcy court to restrain O. from proceeding in the state court and to require R. to deliver the stock to T. T.'s motion was sustained. The court held that the

stock held by R. as escrowee was in the constructive possession of the court and that it had exclusive jurisdiction, and if the stock belonged to O. and not to G. or T., O. would have to make his claim to the stock in the bankruptcy court.

We request the Court first to read the last paragraph on page 14 of petitioners' reply brief which, in substance, claims that the cases cited on page 44 of respondents' brief do not sustain the proposition that an undisputed account in a bank is property subject to constructive possession of a court, and then to examine the cases cited by respondents. In view of the definiteness and certainty of those decisions, how petitioners can baldly assert to this Court that the funds here in question were of such character that they could not come into the custody or possession of the bankruptcy court,—respondents are unable to comprehend.

Petitioners' Point I (6).

Whether petitioners were "trustees", as they claim, or agents or stakeholders, the respondents were the beneficiaries of the Escrow Fund. Those beneficiaries had demanded of the "trustees" or stakeholders that their money in the Escrow Fund be turned over to them. Craig, one of the stakeholders, was willing and eager to turn the money over. The others, Harris and Odell, were not. Who were Odell and Harris protecting when they refused to turn the money belonging to their beneficiaries over to the beneficiaries? In what way, except by a failure of Odell and Harris to perform their duties to their beneficiaries, were the beneficiaries liable to lose any money? Because the bankrupt and its agents, Odell and Harris, had refused, before the bankruptcy petition was filed, to perform their duties to the beneficiaries of the

Escrow Fund, and for no other reason, this litigation was instituted. Petitioners, by their violation of their simple duty to these respondents, had compelled respondents to file their petition, which never should have been necessary. Even though the petition had been filed, yet if the funds were not released by June 1, 1937, petitioners might be personally liable for large sums on account of penalties that might be imposed upon respondents. This was the situation which created the "duress" of which petitioners complain. Duress? By petitioners' own assertions in their brief they show that they were as eager for the District Court to take jurisdiction and to act as were respondents. By petitioners' consent to the agreed order of May 27th they asked the Court to act and then, having asked the Court to act and having themselves acted pursuant to the Court's order, they say to the Court, "We didn't consent. We were forced to consent. You have no jurisdiction to do what we agreed you had jurisdiction to do and should do." And this position is the basis of petitioners' appeal.

Petitioners say it was at all times agreed that the question of the jurisdiction of the Court over the balance of the Escrow Fund was reserved. Under what theory did or could petitioners consent and agree that the Court had jurisdiction over an entire fund and at the same time reserve the right to question the Court's jurisdiction over one-fourth thereof? Under what kind of reasoning can petitioners agree to an order which specifically said the Court had jurisdiction over the balance remaining in the Fund and the Court should distribute it, and at the same time claim that they reserved the right to question the jurisdiction of the Court over said balance? If it was agreed by the parties that petitioners reserved the right to question the jurisdiction of the Court over the balance of the Fund, or if petitioners intended to reserve the

right to question that jurisdiction, why did not petitioners insert in the agreed order that the question of jurisdiction of the Court over the balance of the Fund was reserved? Why did the order provide just the contrary?

Conclusion.

We respectfully submit that there is no substantial question raised by this appeal; that the orders of the District Court appealed from and the orders of the United States Circuit Court of Appeals affirming with costs said orders of the District Court and ordering that petitioners pay to respondents interest on $48,580.40 from July 12, 1937, until said sum is paid, should be affirmed; and that this Court should also enter an order assessing against petitioners damages in the sum of 10 per cent of $48,580.40 in accordance with Rule 30 of this Court.

Respectfully submitted,

Sigmund W. David,
Attorney for Dahl-Stedman Co., et al., Respondents.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHLSTEDMAN CO., et al.,
Respondents.

PETITION OF ROY G. HARRIS and BENJAMIN F. J. ODELL FOR REHEARING.

Come now the above-named petitioners, Roy G. Harris and Benjamin F. J. Odell, and present this, their petition, for a rehearing of this case, and, in support thereof, respectfully show:

I.

JURISDICTION

This court affirmed the judgment of the lower court in this cause on November 21, 1938. This petition is filed within less than 25 days thereafter, under Rule 33 (28 U. S. C. A. Sec. 354).

II.

REASONS FOR PETITION FOR REHEARING

This court has labored under several erroneous impressions as to what the record shows. We shall point out several conclusions in this court's opinion which are in direct conflict with the record.

This court has erroneously assumed that the courts below found that petitioners were agents of the bankrupt.

This court based its entire opinion upon the assumption Harris and Odell were agents of the bankrupt.

The opinion says:

> "Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in bankruptcy was filed and thereafter. * * *" (Court's opinion page 3.)

This statement is entirely unjustified because THE TRIAL COURT MADE NO FINDING WHATSOEVER ON AGENCY. There is nothing whatever in the record which directly or indirectly shows a finding by the trial court that Harris and Odell were agents of the bankrupt.

The Circuit Court of Appeals said the record did not show that Harris and Odell were agents of the bankrupt (Rec. 132, line 15) and admitted that it might be wrong in finding agency (Rec. 132, line 30) and admitted that the record was confusing in some respects (Rec. 133, last sentence).

Therefore the Supreme Court is mistaken in its assertion that both courts below found Harris and Odell were agents of the bankrupt.

In this respect the petition under oath, filed by respondents themselves (Rec. 18-38), alleged that Harris and Odell were agents of the respondents. The language used in that petition is:

"* * * In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, [respondents here] * * *" (Rec. 28).

"The petitioners, [respondents here] * * * on May 10, 1937, requested Benjamin F. J. Odell to cease from acting as attorney or representative of the petitioners. * * *" (Rec. 31).

"The petitioners, [respondents here] * * * on May 19, 1937, requested R. G. Harris to cease from acting for or representing any of the petitioners. * * *" (Rec. 32).

(NOTE: THE INVOLUNTARY PETITION WAS FILED MAY 3, 1937. THEREFORE RESPONDENTS WERE PROTESTING EVEN AS LATE AS MAY 19, 1937, THAT THE ESCROW TRUSTEES WERE THEIR AGENTS.)

"* * * in which moneys neither the Tax Service Association of Illinois, William L. O'Connell, Jr., Receiver * * * have any right or interest, but said Odell, Harris and Craig have the duty to disburse that part of the Fund deposited by petitioners [respondents] in accordance with the directions and re-

quest of petitioners" (Respondents' Petition, Rec. 28).

Even the contract relied upon so confidently by respondents discloses that ODELL WAS THE AGENT AND ATTORNEY OF RESPONDENTS AND NOT OF THE BANKRUPT. We quote:

> "* * * Should it become necessary to prosecute or defend an appeal to the Illinois Supreme Court, the Tax Service Association agrees to assist and aid the designated *subscribers and their attorney* Ben F. J. Odell, * * * " (Italics ours) (Rec. 23).

If any inference is to be drawn from the silence of the trial court on the question of agency, it must be that the trial court found these petitioners to be agents of the contractors; and by implication not agents of the bankrupt.

While petitioners appreciate the operation of the principle that this court will not go into questions of fact settled by the Circuit Court of Appeals, it is submitted that this principle is not applicable here, inasmuch as the fact of agency has not been settled in the courts below. Therefore it seems incumbent upon this court either to determine the question of agency for itself, or to remand the case to the District Court for the determination of this question.

Further, the conclusion that Harris and Odell were agents of the Tax Service Association is wholly inconsistent with the facts which appear in the record as pointed out at length in Brief for Petitioners, Pages 24-27.

Petitioners could not be agents of the Tax Service Association because the record shows:

THE TAX SERVICE ASSOCIATION HAD NO POWER TO REMOVE THE ESCROW TRUSTEES.

THE TAX SERVICE ASSOCIATION COULD NOT WITHDRAW ANY OF THE FUNDS.

THE ESCROW TRUSTEES COULD NOT BIND THE TAX SERVICE ASSOCIATION.

TITLE TO THE FUNDS WAS IN THE ESCROWEES AND NOT IN THE TAX SERVICE ASSOCIATION.

PETITIONERS HAD NO CONTROL OVER THE FUNDS WITHOUT THE APPROVAL OF TRUSTEE CRAIG WHO DENIED HE WAS AGENT OF THE BANKRUPT (REC. 47) AND WHICH RESPONDENTS ADMITTED. (REC. 28.)

THE RESPONDENTS ALLEGED THE TAX SERVICE ASSOCIATION HAD NO INTEREST WHATEVER IN THE ESCROW FUND (REC. 28).

NEITHER THE TAX SERVICE ASSOCIATION NOR THE RECEIVER HAVE CLAIMED PETITIONERS WERE BANKRUPT'S AGENTS.

THE VERY OBJECT OF ESCROWING THE FUNDS WAS TO PREVENT DOMINATION BY THE TAX SERVICE ASSOCIATION OR ANYBODY ELSE, SAVE THE THREE TRUSTEES JOINTLY.

This court has misconstrued the "agreed order", and overlooked entirely both its limited nature and the duress by which it was procured.

This court in its opinion has stated:

> "* * * Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a summary proceeding. * * *" (Court's opinion, pages 3-4).

The contention of consent is one of the main issues in controversy. These petitioners find themselves apparently precluded here by the assumption of this court that they consented to the jurisdiction of the District Court to disburse the funds in controversy. At most, petitioner

consented to disbursal of a portion of a larger fund, or perhaps more accurately stated, a withdrawal from the controversy of a portion of the funds in escrow.

This court seemingly takes no cognizance of the necessarily extended argument of petitioners with respect to consent in their brief (pages 34-47). We endeavored to point out that not only did the literal language of the so-called "consent order" not extend to the ultimate disbursal of the fund, but even such consent as may have appeared was wholly negatived by duress; also that there was a general understanding among parties to that litigation in the Bankruptcy Court (Rec. 62, 93-94) that the said order was entered without prejudice to objections to the jurisdiction of the court; moreover, that consent alone cannot confer jurisdiction on any federal court.

The erroneous assumptions with respect to agency and consent led this court to ignore entirely the fundamental issue of jurisdiction presented.

The erroneous assumption of the existence of agency and the erroneous assumption of the presence and actuality of consent prevented this court from considering the question of jurisdiction inasmuch as it was assumed that this was an ordinary proceeding in bankruptcy. If the court had entered upon a consideration of the questions of agency and consent, and had determined either in the negative, it would then have been confronted squarely with the jurisdictional question which your petitioners have urged not only upon this court but upon both courts below. Your petitioners confidently submit that had such question of jurisdiction been considered, this court could have reached but one conclusion, *i. e.*, that this litigation involves a controversy which is not cognizable by a

court of bankruptcy upon any theory, and in connection with which there is no necessity whatever for inquiring whether an adverse claim has or has not been set up (Brief for Petitioners, page 14).

However, assuming an adverse claim to have been necessary to defeat jurisdiction, the opinion makes it difficult to understand why we should be penalized for failure to set up an adverse interest when we sought to do so and were denied that right, which fact incontrovertibly appears in the record (Rec. 96). Upon the first indication that the court was going to overrule petitioners' motions to strike interveners' pleadings, your petitioners instantly asked leave to file a pleading setting out such substantial adverse interest, which leave was denied (Rec. 96). Such pleading would have disclosed not only substantial adverse claims in petitioners as individuals, but as fiduciaries and trustees as well.

This court has overlooked the fact that the pleadings on file in this case do not state a controversy cognizable in any Federal Court.

It is clear that if the assumption of agency be investigated and negatived there is no theory upon which jurisdiction can be predicated. Certainly jurisdiction cannot be conferred upon a Federal Court by consent alone. It is earnestly submitted that if, in the absence of agency, the court sustains jurisdiction of this controversy, there is no possible litigation, jurisdiction of which cannot be conferred upon a Federal Court by intervention in some pending bankruptcy proceeding selected at random. We can see no point at which the court could draw the line.

It seems to your petitioners that the task of this court

in the instant case, as well as the task of the District Court, is very simple. The pleadings filed by the intervenors were before the District Court; they are now before this court as part of the record. These pleadings, as indicated in our brief at pages 40-47, do not state a cause of action cognizable in any federal court. Hence the District Court should have dismissed the proceeding on its own motion and this court should now reverse the previous decision in this proceeding and order the litigation dismissed.

Apparently this court sanctions by silence the flagrant denial by the District Court of any semblance of due process of law.

This court has recently concerned itself in the Morgan case with the constitutional right of parties to be heard before administrative tribunals and officials. Yet in its instant opinion in this case the court declines even to comment upon the strenuous contention consistently urged by your petitioners that they have been deprived of property by a Federal Constitutional Court without any opportunity whatever to be heard. This error was discussed in full in our brief pages 47 to 55 and in our reply brief pages 19 to 21.

Certainly in this case there has been scant consideration for petitioners' rights. The Circuit Court of Appeals purports to hold that petitioners have no rights even with respect to the $20,000 balance (Rec. 133), notwithstanding the fact that no issues have ever been framed with respect to the $20,000, and notwithstanding the fact that such issue has not yet been determined by, but is still pending before, the District Court.

Certainly this court cannot intend to approve the Cir-

cuit Court of Appeals action in making findings on issues not before that court.

Interest on Funds.

The Circuit Court of Appeals have charged petitioners with interest, and this court by saying nothing upon that subject would also seemingly hold petitioners liable for interest. Carrying this case to this court of last resort was incumbent upon your petitioners as trustees. It has been, and is, petitioners' position that the trial court in ordering them to turn over these funds, not to the beneficiaries, but to the so-called special committee of three, was and is wholly without jurisdiction. Disbursing these funds in such fashion, pursuant to an order of court void for want of jurisdiction, could not absolve your petitioners from an accounting liability to all the contractors. The order did not require the committee to distribute the funds in accordance with the trustees' obligations to return it to the contractors. Petitioners can be protected only by decision of this court. It is manifestly unjust to charge these petitioners personally with interest in this cause especially as the order appealed from was to compel a physical act—sign a check—and not for a decree for the payment of money as contemplated by Rule 30. These petitioners have personally been required to advance substantial costs in their effort to protect their beneficiaries, and interest should not be made an additional personal liability.

CONCLUSION.

The principal basis of the decision both in the Circuit Court of Appeals and in this court is the assumption that petitioners were agents for the alleged bankrupt, that they were not trustees, that there is no substantial adverse interest in the petitioners anywhere disclosed, and that in no sense were the funds deposited for the benefit of either of the petitioners. Contrast these assumptions with the actual situation as it appears from respondents' own language. In the first intervening petition (Rec. 28) respondents alleged:

> "* * * said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, * * * and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, * * *"

i. e., they held funds as agents for both parties, which translated into legal verbiage would make them trustees. In the Reply Brief for Respondents (their last brief, page 10) respondents state:

> "Whether petitioners were 'trustees', as they claim, or agents or stakeholders, the respondents were the beneficiaries of the Escrow Fund. * * *"

i. e., they admit that petitioners were trustees and respondents the beneficiaries. In the conclusion to respondents' principal brief (page 69) respondents admit that one of the objects of the creation of the trust was to guarantee to Odell the payment of his fees. Thus respondents admit that petitioners were not agents but trustees and that one of the purposes of creating the trust was to insure, was to protect, Odell in his fees, thus conceding a substantial adverse interest in the fund, if such be necessary. Moreover, in the same conclusion and

in the same paragraph (Brief for Respondents, page 69), respondents admit that the so-called "consent order" was entered into by your petitioners under compulsion of possible personal liability of $100,000. Thus we find in respondents' own language the admission of duress which this court has apparently ignored when it came from petitioners' lips.

Let us see just what the circumstances of this underlying situation are, shorn of intentionally misleading technical diversions:

In March and April, 1937, preparations were being concluded by the escrow trustees for the orderly distribution of the Escrow Funds (1) to the State of Illinois, and (2) to the contractors, less agreed deductions. While the escrowees were thus engaged, the so-called "special committee" appeared on the scene.

First this special committee suborned some of Odell's clients and induced them to execute a power of attorney authorizing that committee "to terminate all relations with any attorney heretofore representing the said petitioners * * *" and to "* * * incur such expenses, including attorney's fees as may be necessary * * *" (Rec. 31).

Here is revealed the real motive for the intervention by the special committee, *i. e.*, the possibility of obtaining fees and expenses for itself and its attorney and the possibility of depriving Odell of a reasonable fee for his services for which the Escrow Fund had been created.

On May 10, 1937, the committee, with no grounds whatsoever, decided to discharge the contractors' attorney and agent, Odell (Rec. 31).

On May 19, 1937, the committee decided that they would discharge agent Harris (Rec. 32).

There were absolutely no grounds, alleged or otherwise, for the wrongful discharge or removal of petitioner Odell and there was no offer, in the record or otherwise, to pay him anything for his services. By thus interfering with the duties of the escrow trustees, the special committee succeeded in hindering the distribution of the Escrow Funds to the State and to the contractors.

On May 24, 1937, only a week before the "dead line" for payment of the tax money to the State, the Committee filed its petition and tied up the funds so that it became impossible to pay the State and avoid the impending $100,000 penalty unless "consent" was given to the "agreed" order. Petitioners, considering only their duty to their beneficiaries, approved the order, but with an explicit understanding jurisdiction was not waived (Rec. 93, 62). When petitioners attempted to assert an adverse claim, they were prevented by the court from so doing (Rec. 96).

The opinion of this court now condemns and penalizes these petitioners for their faithfulness to their beneficiaries, and that opinion likewise endorses the predatory tactics of the intervening committee.

For the reasons herein shown it is respectfully urged that petitioners herein be granted a rehearing; that the proceedings in the lower courts be, upon further consideration, reversed, or in the alternative that the case be remanded to the trial court for hearing on the merits; that the opinion of the Circuit Court of Appeals be modified to eliminate interest charges wrongly assessed against petitioners, and that there be stricken from the opinion of the Circuit Court of Appeals language deciding matters not in issue (more specifically with respect to Odell's right to receive his compensation for his services, and

with respect to petitioners' rights in the $20,000 balance, etc.).

Respectfully submitted,

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

We, Benjamin F. J. Odell and Kenart M. Rahn, counsel for petitioners in the above entitled cause, do hereby certify that the foregoing petition for rehearing in this case is presented in good faith and not for delay.

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

FILED
DEC 9 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY OF RESPONDENTS TO PETITIONERS' PETITION FOR REHEARING.

SIGMUND W. DAVID,
Attorney for Respondents.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY OF RESPONDENTS TO PETITIONERS' PETITION FOR REHEARING.

From a reading of the petition for rehearing, one would conclude that this Court had ignored the record, had not read the briefs and had not heard the oral argument. With two exceptions, hereafter referred to, petitioners' reasons for rehearing are nothing but repetitions of the argument made by them in their briefs and oral argument, in many instances predicated upon inaccurate statements of the facts similar to those previously made by them.

Petitioners' first reason for rehearing (one of the aforesaid two exceptions) is that:

"This court based its entire opinion upon the as-

> sumption Harris and Odell were agents of the bankrupt."

Petitioners' statement is incorrect. This Court's opinion shows it did not "assume" that petitioners were the agents of the bankrupt. Relying upon the record and the findings of the District Court and the Circuit Court of Appeals, this Court found that petitioners were such agents. That petitioners were in fact the agents of the bankrupts has been previously shown by respondents (respondents' brief, pp. 30-32, 43-43; respondents' reply brief, pp. 1-3). Petitioners further say that this Court was in error in stating that the courts below found that petitioners were agents of the bankrupt. This Court's statement was correct. As we pointed out (respondents' brief, pp. 31-32; respondents' reply brief, pp. 2-3) the District Court, in making the findings and orders it did, necessarily considered the facts alleged in respondents' petition of May 24th to be true, and the facts alleged in that petition conclusively showed that Odell and Harris were the agents of the bankrupt, and said petition specifically so alleged. (R. 28.) The Court of Appeals specifically found that Odell and Harris were the agents of the bankrupt. That Court said (R. 132):

> "The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs. It is claimed they were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he

plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction. It seems to us, even though it has been finally determined the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund."

While petitioners admit that this Court will not review questions of fact settled by the Circuit Court of Appeals, they assert that "the fact of agency has not been settled in the court below." As petitioners' claim is directly contrary to the record, nothing further need be said concerning this alleged ground for rehearing asserted by petitioners.

Petitioners' claim that this Court misconstrued the agreed order and overlooked entirely its nature and how it was procured is merely a repetition of what has been thoroughly covered by the briefs and oral argument. (Petitioners' brief, pp. 34-40; petitioners' reply brief, p 15; respondents' brief, pp. 48-56; respondents' reply brief, pp. 10-12.) This Court's statement in its opinion that:

"Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a summary proceeding."

is strictly in accord with the record facts.

Petitioners claim that this Court ignored entirely the fundamental issue of jurisdiction presented. The fact is just to the contrary. This Court's opinion commences as follows:

"Did the bankruptcy court in this involuntary proceeding have jurisdiction to order the disposition of property in the possession of persons found by the court to be holding as agents of the alleged bankrupt?"

Petitioners claim that this Court declined even to com-

ment upon their contention that they were deprived o property without any opportunity to be heard. This claim is merely an unjustified criticism of this Court, in line with petitioners' consistent policy of attacking the District Court, the Court of Appeals and counsel for respondents, regardless of the facts. Petitioners ignore entirely the statement made by this Court, based upon the record, that:

> "In response to the court's request to answer, petitioners alleged that the court had no jurisdiction to determine rights relating to the Fund. • • • The following day the court ordered that petitioners' pleadings which challenged its jurisdiction over the $20,000 balance in the Fund be struck, and that petitioners answer within twenty days to the merits on respondents' claim to this balance.
>
> "Petitioners did not answer, but appealed from both orders."

The Court of Appeals also expressly found that petitioners were not deprived of any opportunity to be heard, but that they consistently declined to assert any interest or show any right in the Escrow Fund. (R. 133.)

Petitioners claim that they should not be charged personally with interest. Their claim is based upon (1) their assertion that the order ordering them to turn over the money to respondents is void for want of jurisdiction despite the fact that the District Court, the Circuit Court of Appeals and this Court have all determined and decreed that the District Court had jurisdiction and that the order was valid; and (2) their assertion that they were trustees and not agents of the bankrupt, despite the fact that all of said courts have found to the contrary. But there are additional reasons why their claim should not be considered.

They have no legal right to ask this Court to modify the order of the Court of Appeals concerning interest

entered April 11, 1938. (R. 197.) Their petition for a writ of certiorari did not ask for a review by this Court of said order of the Court of Appeals. In said petition petitioners specifically prayed this Court to review *only* the judgment of the Circuit Court of Appeals entered March 9, 1938, affirming the District Court orders of July 12, and July 13, 1937. (Petition for certiorari, pp. 1-2.) Their specifications of errors (brief for petitioners, pp. 8-9) did not include any specification of error regarding the order of the Court of Appeals for the payment of interest; and in none of their briefs filed in this Court did petitioners mention the point. We assume, without further discussion, that this Court will not consider a request by petitioners that this Court modify or reverse an order of the Circuit Court of Appeals, made by petitioners for the first time in their petition for rehearing.

If petitioners' claims that they were trustees of the Escrow Fund, not agents of the bankrupt, that they were acting throughout these proceedings not for their own benefit but to protect the beneficiaries of the Fund, and that they have a substantial interest in the Fund were sound, then the Circuit Court of Appeals would not have ordered petitioners to pay interest from the date petitioners were ordered to turn over the money until they turn it over. But the record in this case not only refutes petitioners' claims, but proves the contrary. The record proves, as respondents have previously pointed out in their briefs (respondents' brief, pp. 17, 63; respondents' reply brief, pp. 5, 10-11) that this litigation was instituted by these respondents because petitioners, agents of the bankrupt and, as such agents, custodians of the Escrow Fund, refused to perform their simple duty to the owners of the Fund of distributing it to said owners. The record proves that petitioners have violated their

duty to these respondents and have carried on this lit gation not for the purpose of protecting any ben ficiaries—(the beneficiaries of the Fund whom the pet tioners claim they were protecting were these respon ents, who were asking that they be not "protected" b petitioners but that the money be turned over to them), but in the expectation that by making it expensive an difficult for respondents to obtain their money, petitioner would compel respondents to pay them something to whic they were not entitled. Since the order of July 12, 193 was entered by the District Court, the appeals which hav been prosecuted by the petitioners have been for the pur pose of delay and annoyance only. Therefore, it is re spectfully submitted by respondents that the order of the Court of Appeals that petitioners personally pay interes on the part of the Fund they were ordered to turn over for the period of the pendency of the appeals, was correct just and proper.

With their customary disregard of the record facts, peti tioners, in discussing this question of interest, refer to the Special Committee as the "so-called Special Committee." Upon the allegations of respondents' sworn petitions (R 31, 72) not denied in any respect, the District Court spe cifically found in its order of July 12, 1937, that

> "George V. Dahl, Henry P. Reger and Louis Naro wetz, Sr., Special Committee on Illinois Retailers' Oc cupation Tax, are authorized to receive, on behalf o the petitioners, the moneys belonging to petitioners i said Sales Tax Escrow Fund in the National Builders Bank of Chicago." (R. 98.)

And petitioners' supersedeas bond, signed by them, pro vides:

> "Payment to Obligees of any payments due t Obligees under this bond shall be made by making pay ment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers Occupation Tax." (R. 127.)

It is further respectfully submitted by respondents that this Court has the right to, and should, enter an order here, as heretofore requested (respondents' brief, p. 70; respondents' reply brief, p. 12), assessing against petitioners damages in the sum of 10% of $48,580.40, in accordance with Rule 30 of this Court. As is apparent from the record, petitioners had no interest in the $48,580.40 they were ordered to turn over to respondents, and there was no reason for their refusing to comply with the order of July 12, 1937, and prosecuting the appeals to the Circuit Court of Appeals and to this Court, except to harrass respondents and to prevent them from getting the money which belonged to them so that respondents would be inclined to pay something to petitioners to which petitioners were not entitled. This is, it is submitted, a clear case of trivial appeals prosecuted only for the purpose of delay and to harrass opposing litigants. It is, therefore, submitted that paragraph 2 of Rule 30 of this Court should be applied, and that the mandate of this Court, in addition to affirming the decree of the Circuit Court of Appeals, should provide that petitioners pay to respondents, out of petitioners' own money, damages in an amount equal to 10% of $48,580.40. This relief has been granted by this Court in similar cases. See

Wagner Electric Manufacturing Co. v. *Lyndon*, 262 U. S. 226; 67 L. Ed. 961.

Deming v. *Carlisle Packing Co.*, 226 U. S. 102.

For analogous cases, see

Chicago Bonding & Surety Co. v. *United States, for use of Frank Adams Electric Co., et al.*, 261 F. 266, 269.

Robertson v. *Wilkinson*, 10 F. (2d) 311, 312.

By reason of petitioners' appeal to the Circuit Court

of Appeals and to this Court, which were essentially f
olous and prosecuted solely for the purposes of delay
annoyance, respondents have been compelled to have t
attorneys perform extensive services. If this Court
ders petitioners to pay respondents damages of 10%
said $48,580.40, the amount so received by respond
will be merely partial compensation to respondents
the damages they have suffered by reason of said appe

It is, therefore, respectfully submitted that petition
petition for rehearing should be denied; and that
Court should enter an order providing for payment
respondents by petitioners of damages of 10% of $
580.40, and that said payment shall be made to Geo
V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Spe
Committee on Illinois Retailers' Occupation Tax, as is
method of payment specifically provided in the su
sedeas bond filed in this Court. (R. 126.)

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Stedman
et al., Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1938.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Roy G. Harris and Benjamin F. J. Odell, Petitioners, *vs.* Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Respondents.	

[November 21, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Did the bankruptcy court in this involuntary proceeding have jurisdiction to order the disposition of property in the possession of persons found by the court to be holding as agents of the alleged bankrupt?

Respondents engaged the Tax Association of Illinois to seek exemption for respondents from an Illinois tax. The contract entitled the Association to $1,500 cash, and an additional $20,000 should the Supreme Court of Illinois find respondents exempt. The contract authorized the Association to retain petitioner Odell as attorney to prosecute the claimed exemption without cost to respondents for his services. Odell endorsed the contract between respondents and the Association with the statement: "I hereby consent to retention under the terms of this agreement." Under the contract respondents made payments—corresponding to their possible tax liabilities—into an Escrow Fund. Petitioners Odell and Harris, employed by the Association, and one Craig, deposited these payments pursuant to a letter[1] to the Bank which declared

[1] "National Builders Bank of Chicago.

"Gentlemen:

"There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.

"You are hereby instructed that *the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody*

that the funds deposited were not the property of either Odell, Harris or Craig, but were in their custody.

The Supreme Court of Illinois decided respondents were liable for the tax,[2] and thereafter an involuntary petition in bankruptcy was filed against the Association. Craig was willing but Odell and Harris refused to comply with respondents' request for the return of the payments they had made into the Fund, and respondents filed a petition for their recovery in the bankruptcy court. Petitioners consented and agreed in open court to an order of the bankruptcy court which required them to pay seventy-five per cent of the Fund ($242,000) to the State of Illinois in discharge of respondents' tax liability, and which also provided that "the balance in said . . . Fund . . . shall remain and be held . . . subject to the further order" of the bankruptcy court. It recited that petitioners "agreed that [the bankruptcy court] had jurisdiction to enter this order."

Respondents then filed a second petition to recover an additional $48,580.40 from the Fund, with $20,000 to remain "subject to the further order of" the court. In answer to respondents' claim, the Bank and Craig disclaimed any interest in the Fund. The sole claim adverse to respondents was asserted by the receiver of the Association, for $20,000. Neither Odell nor Harris claimed any interest in the Fund. In response to the court's requests to answer, petitioners alleged that the court had no jurisdiction to determine rights relating to the Fund. After a hearing, the court found that it had jurisdiction and ordered petitioners to pay $48,580.40 from the Fund to respondents, the balance to remain "subject to the further order of [the] . . . Court . . . ." The following day the court ordered that petitioners' pleadings which challenged its jurisdiction over the $20,000 balance in the Fund be struck, and that petitioners answer within twenty days to the merits on respondents' claim to this balance.

and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each check must bear the signature of either: Benjamin F. J. Odell or Ruth V. Willner; and R. G. Harris or P. N. Weaver, together with E. M. Craig or R. D. Steel." (Italics supplied.)

[2] Brome Co. v. Ames, 365 Ill. 456.

Petitioners did not answer, but appealed from both orders. The Circuit Court of Appeals affirmed.[3]

A court of bankruptcy has jurisdiction to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; [and to] cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto," with exceptions not here material.[4] This jurisdiction of the bankruptcy court extends to the determination of controversies relating to all property in the debtor's physical possession *or* in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy.[5] In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.[6]

Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in bankruptcy was filed and thereafter. We accept this finding,[7] and proceed to a consideration of the jurisdictional question.[8]

Petitioners controlled and had custody of this Fund as agents of the Association and did not assert any adverse interest in themselves. In the absence of a substantial adverse claim, the bankruptcy court acquired jurisdiction—when the petition in bankruptcy was filed—to determine controversies relating to the Fund,[9] and had power by summary proceedings to compel its surrender.[10] Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a

[3] 95 F. (2d) 373.

[4] Bankruptcy Act, c. 2, 11 U. S. C., Sec. 11 (6, 7). As to exceptions, see Bryan v. Bernheimer, 181 U. S. 188, 194.

[5] Mueller v. Nugent, 184 U. S. 1; see Whitney v. Wenman, 198 U. S. 539, 552; Taubel, Etc., Co. v. Fox, 264 U. S. 426, 432, 433 and notes; May v. Henderson, 268 U. S. 111, 115.

[6] Taubel, Etc., Co. v. Fox, *supra*, 433; May v. Henderson, *supra*, 116. See, Harrison v. Chamberlain, 271 U. S. 191, 194.

[7] "In this case, however, respondent [petitioners] asserted no right or title to the property before the referee, and the circumstances under which he [they] held must be accepted as found by the referee and the District Court." Mueller v. Nugent, *supra*, 15.

[8] Cf. Page v. Arkansas Gas Corp., 286 U. S. 269, 271.

[9] Taubel, Etc., Co. v. Fox, *supra*, 433; see Note 5, *supra*.

[10] Cf. Mueller v. Nugent, *supra*, 14.

summary proceeding. Jurisdiction to try the issues was vested in the District Court sitting as a court of bankruptcy. Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right.[11] Petitioners approved the first order which disposed of part of the Fund, and specifically provided that the balance remain "subject to the further orders of" the District Court.

All persons who created or had any possible interest in that portion of the Fund ordered distributed were parties and present in the bankruptcy court. No one of them—including petitioners—asserted or in any way indicated to the bankruptcy court that there could be any interest in the money distributed adverse to respondents. The sole claim adverse to respondents was that of the receiver of the Association, for $20,000. This amount was not distributed and the court retained jurisdiction to determine controversies relating to it.

Petitioners having consented that the Fund be subject to the orders of the bankruptcy court, and that court having determined that petitioners held the Fund as agents of the Association, there was jurisdiction to enter the orders in question.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[11] MacDonald v. Plymouth Trust Co., 286 U. S. 263; Bryan v. Bernheimer, *supra*, 197; see Taubel, Etc., Co. v. Fox, *supra*, 437; Page v. Arkansas Gas Corp., *supra*, 271; cf. Schumacher v. Beeler, 293 U. S. 367, 369.